The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

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INTRODUCTION

The State of Tennessee Executive Order No. 87 (September 17, 2021) hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

The Council requests that applicants use the Microsoft Word form and respond directly on the form using the boxes provided below each question. (The boxes will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit your original hard copy (unbound) completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts as detailed in the application instructions. Additionally you must submit a digital copy with your electronic or scanned signature. The digital copy may be submitted on a storage device such as a flash drive that is included with your original application, or the digital copy may be submitted via email to john.jefferson@tncourts.gov .

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

I have served as Chancellor of the First Judicial District since August 2013.

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

I was licensed to practice law in 1994 and assigned the number 016864 by the Board of Professional Responsibility.

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

State of Tennessee, BPR #016864, issued and continuously active since 1994. United States District Court, Eastern District of Tennessee, continuously active since 1995.

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any state? If so, explain. (This applies even if the denial was temporary).

No.

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

August 2013-present – Chancellor of the First Judicial District (Carter, Johnson, Unicoi and Washington Counties);

November 2012-August 2013 – County Attorney and in-house counsel, Department of Legal Services, Washington County, Tennessee;

2008-October 2012 – solo practitioner in Jonesborough, Tennessee;

2005-2008 – partner, Rambo, Wheeler & Seeley in Jonesborough, Tennessee;

2003-2013 – municipal judge, Town of Jonesborough, Tennessee;

2001-2003 – assistant municipal judge, Town of Jonesborough, Tennessee;

2001-2005 – partner, Herrin, Booze, Rambo, Wheeler & Jenkins in Jonesborough, Tennessee;

1996-2001 – partner, Herrin, Booze & Rambo in Johnson City, Tennessee;

1994-1995 – associate, Herrin & Herrin in Johnson City, Tennessee; and

Summer 1992 and 1993 – law clerk, United States Attorney's Office for the Eastern District of Tennessee – Greeneville office.

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

Not Applicable.

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

Not applicable.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Council needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Council. Please provide detailed information that will allow the Council to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

I practiced law for 19 years in Northeast Tennessee prior to assuming the Chancery Court bench in 2013. I started in the father and son law firm of Herrin & Herrin in Johnson City. Mr. Kent Herrin died the weekend I was sworn in before the Tennessee Supreme Court as a new attorney. I worked for his son Erick Herrin my first year, and Mr. Herrin merged his practice with Mr. Earl Booze and formed the law firm of Herrin, Booze & Rambo, during my second year of law practice.

My first client I acquired was the Town of Jonesborough. Town leaders were looking for a young and eager attorney, and the Board of Mayor and Aldermen appointed me to serve as the town attorney during the same month I obtained my law license. Five years later, the County Executive for Washington County asked that I consider the position of county attorney. I took the job and became county attorney in 1999.

During the first 10 years of my law practice, I was one of the attorneys at the firm assigned to handle Tennessee Municipal League Risk Management Pool cases in Northeast Tennessee. I defended workers' compensation claims, personal injury claims, and civil rights claims for municipalities. From Rogersville to Mountain City, I also tried, ADA claims, defective street claims, sewer back-up claims, claims of excessive police force, slip and fall injuries, claims against building code departments, automobile crashes, and almost every other imaginable claim that could be brought against a municipality.

In addition to defense work, I maintained a general practice during my 19 years of private practice. My law practice featured all types of clients and claims, from civil matters to criminal cases. I appeared in the Circuit, Chancery and General Sessions Court on civil matters, and even had the occasional criminal case in the Sessions or Criminal Courts. Before I became county attorney, I was assigned the occasional indigent defense case in Criminal Court, and I represented various persons on criminal cases in the General Sessions and Criminal Courts at no charge. However, my practice was overwhelming in civil law.

I have appeared before the Court of Appeals and the Workers' Compensation Panel for the Supreme Court a dozen times. I was fortunate to have several business clients. I collected debts for local businesses, filed scores of detainer warrants for two real estate holding companies, represented a local funeral home, a new-car dealership, a farmers' cooperative, and several small businesses and non-profits with incorporation, by-laws preparation, and the occasional business or employment contract. Variety described the cases I handled for individuals in our rural community. I have handled name changes, paternity cases, child support claims, divorces, probate of estates, the preparation of wills and trusts, orders of protection, conservatorships and juvenile court matters. I have prepared deeds and represented property owners in contract negotiations and development deals with major retailers and banking institutions.

In addition to my private practice, Washington County kept me busy. When I was county attorney, I worked with 25 county commissioners and nine county officials, numerous department heads, committees and agencies. Washington County was self-insured for all liability claims, except automobile coverage and workers' compensation. The county attorney position required me to defend civil rights claims in both state and federal courts, lawsuits against the county claiming the use of excessive force in the county jail and by patrol deputies, claims for personal injuries resulting from automobile crashes due to allegedly defective county roads, actions in condemnation and inverse condemnation claims, and lawsuits related to school board contracts. I handled scores of land-use cases in chancery and circuit courts.

In my previous law practice, I represented employers and employees during administrative hearings for unemployment benefits, writs of certiorari related to the actions of county boards, such as the local board of zoning appeals and beer board. I have appeared before state agencies opposing the state's attempt to decertify the Washington County jail. I represented a water utility district for twelve years and appeared before water state quality review boards and utility management review boards. I have represented the county school system in district-teacher union arbitration hearings. I was the attorney for the Washington County Industrial Development Board, which handled the issuance of bonds and payment in lieu of tax agreements related to the recruitment of industry and businesses. I have also represented Washington County in claims before the State Board of Equalization. I successfully defended a class-action lawsuit against the county concerning the revocation of probation for failure to pay fines. I tried and

handled the appeal in a Washington county case concerning whether judicial immunity of the General Sessions Court judges extends to a county under the Governmental Tort Liability Act. I have appeared in the Davidson County Chancery Court on administrative law claims. I have responded to and defended claims concerning employment practices brought by the Tennessee Human Rights Commission and EEOC complaints. I have represented the county school system regarding investigations and administrative complaints from the Federal Department of Education. I have also defended Section 1983 civil rights claims against Washington County in the Federal District Court at Greeneville.

As a county attorney, I have written several private acts adopted by the General Assembly that apply to Washington County. These included the private act providing for the consolidation of Chancery and Circuit Court venue from Johnson City to Jonesborough to enable the construction of a new justice center in Jonesborough and the closure of the old court building in Johnson City. The last private act that I wrote created the first environmental court in Northeast Tennessee in Washington County.

As chancellor since 2013, I have presided over 23,000 cases in chancery and probate. The best aspect of the job is presiding over hundreds of adoptions. According to the records of the Administrative Office of the Courts, it appears that I handled more adoptions than any judge in the state of Tennessee during the 2014-2022 eight-year term of judges.

When the Covid-19 emergency limited court activity in March 2020, I am proud that we never closed the clerks' offices, and my assistant and I worked every day in person (unless we had Covid). We learned to innovate to make court happen and used Zoom conferencing to conduct hearings and trials. Because we remained open and active, chancery court filings for the year increased from 2,368 to 2,571 (1,500 is the average annual civil caseload expected of a civil trial judge). We managed to disposition 2,494 cases during the peak year of Covid-19 shutdowns. We entered and left the period of Covid-19 court restrictions without a backlog.

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

The following are examples of work from my law practice:

Graybeal v. Tennessee Department of Human Services. This was a matter concerning the interpretation of a statute that granted the State of Tennessee a priority to establish a blind vendor operated commissary at a county-owned facility. The disputed issue concerned whether the state's priority for vending services at local government facilities extended to a county jail. The cause was initially administratively adjudicated by the Secretary of State in favor of the Department of Human Services. Washington County appealed the Secretary of State's decision to the Chancery Court of Davidson County, which affirmed the Secretary of State. On appeal to the Court of Appeals at Nashville, the blind vending statue was finally held to grant the right to the State of Tennessee to operate an inmate commissary in a county jail.

Gentry v. Town of Bluff City, et al. J.C. Gentry was an alderman and vice-mayor of the Town of Bluff City. The mayor resigned, and the town's charter provided for the vice-mayor to assume the office of mayor. However, Mr. Gentry resigned as the prospective mayor. The administration of the Town of Bluff City and the Board of Mayor and Aldermen thereafter

excluded him from the Board on the basis that Mr. Gentry forfeited his position as alderman when he became mayor and that his resignation as mayor excluded him entirely from membership on the Bluff City Board of Mayor and Alderman. On behalf of Mr. Gentry, I filed a Complaint for Declaratory Judgment and petition for Writ of Mandamus and Complaint for Temporary and Permanent Injunction. This case was tried in the Chancery Court of Sullivan County. Many of the relevant facts were undisputed, and the case focused on the interpretation and analysis of the general law regarding public officials and the private act creating the Town of Bluff City – specifically related to the effective date of a resignation, whether a resignation was perfected, and whether Alderman Gentry automatically became mayor when a vacancy in the position of mayor occurred. Further issues included whether the old mayor who tendered his resignation remained mayor, whether an oath of office was required to install a new mayor, and whether the vice-mayor had the authority to call a special meeting for the purpose of electing a new mayor. Chancellor Moody ruled in favor of Alderman Gentry in all regards and restored him to his office.

Vic Davis Construction, Inc. (Claimant) and Washington County, Tenn. (Respondent). This matter was a complex construction claim that was arbitrated before the American Arbitration Association, Construction Industry Arbitration Tribunal. Washington County was the responsible party for hiring the Claimant to prepare two site pads for industrial building construction. Claimant asserted that it was entitled to $312,725 in payment for additional work performed because of poor soils and alleged faulty soil sampling, among other claims. Claimant further sought $167,870 in delay damages. After extensive preparation, the parties presented their claims and defenses during a four-day arbitration. This matter was my first formal AAA arbitration, and the preparation of the defense included extensive use of several geotechnical and civil engineers (on both sides). I was the attorney for Washington County, and the county was awarded judgment dismissing all claims.

McMahan v. Greene. Plaintiff brought suit against his neighbor to clear title to a boundary line dispute. Plaintiff prevailed in the trial court in Carter County, and his neighbor appealed. His trial attorney referred the representation of plaintiff to me for the appeal in the Court of Appeals. Each party obtained their land through a complicated chain of title. The property was originally acquired in 1921 and divided into two tracts in 1955. The legal arguments involved the legal preference in Tennessee for natural objects or landmarks over artificial objects in ascertaining a property boundary. In this case, the competing claims related to a property description relying on the landmarks of an old white oak tree, the depths of the hollow and the fork of the creek versus courses and distances description by metes and bounds. The calls for neighboring deeds were also reconciled with the competing deed claims. The Court of Appeals affirmed the Circuit Court ruling in favor of my client.

These are some examples of my work as a private attorney. The written attachments noted in response to Question 34 are opinions written by me that reflect a sample of my work as Chancellor. All of my writing samples were judgments that were later appealed to the Court of Appeals or Supreme Court.

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any

noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

In response to this question, I attached writing samples that reflect some of the noteworthy cases that I have handled as Chancellor. The remainder of this response describes my experiences as Chancellor since 2013. In addition to deciding cases, the Supreme Court has the responsibility to administer the court system efficiently and effectively. They also promulgate rules that regulate the practice law. My record shows that I have necessary administrative skills in addition to my legal qualifications.

When I was appointed by Governor Bill Haslam to serve as the Chancellor of the First Judicial District, there were 2,815 chancery and probate cases pending in my court. In 2013, approximately 1,850 cases were annually filed. In several counties, delinquent tax sales were several years behind (nine years in Carter County). I took the initiative to increase efficiency and user service. With the help of the clerk and masters, their staff, and the bar, we have reduced the number of cases pending as of November 30, 2022, to 1,475. Delinquent tax suits are now dispositioned every year before the next tax year suit is filed. We also implemented internet bidding at delinquent tax sales, which increased the sales price to the benefit of local government and property owners. While we were reducing the number of cases pending, the filings in our court increased to approximately 2,500 per year. All of this means the average age of chancery and probate cases are well under one year with over 90% of the cases finished within one year of filing.

Within the chancery and probate courts, we have implemented the Trial Court Performance Measures of the National Center for State Courts. Each month we track the clearance rates (number of outgoing cases as a percentage of incoming cases), the time to disposition (the percentage of cases disposed or resolved within established time frames), and the age of active pending caseload (the age of the active cases pending, measured as the number of months from filing until measurement). We also strive to have trial date certainty, which is the court's ability to hold trials on the date they are scheduled. As a result, the Chancery Court for the First Judicial District has the least percentage of cases of any chancery court in the state with cases that are over three years old. Over a period of three years, we will receive filings of approximately 7,500 cases, but at any given time we have only approximately one to two dozen cases that are older than three years. Each file is reviewed at least every three months to ensure the case is on track for timely disposition.

As the chancellor responsible for chancery and probate court, I worked with the clerk and masters to establish customer service and efficiency goals. Where possible, deputy workstations are kept at the service windows to provide prompt and friendly service to citizens. We surrendered typewriters to county surplus equipment. I required that all legal mail must be worked each day and all orders entered before the workday ends. Our employees are cross trained to do most tasks in the office, so absences and vacations do not impede the completion of work. I have appointed attorneys to serve as clerk and master in the two largest counties in the First Judicial District. Each clerk and master is required to learn all aspects of the clerk's office, so the clerk can effectively manage deputies. We work closely with attorneys so they receive electronic copies when orders are entered, when requested. We are conservative with

expenditures. Although the average chancery annual filings in the district increased by approximately 33%, we voluntarily eliminated two deputy clerk positions since my appointment. We now do more and produce better service with less people.

I am the local state judge on the court security committees for Carter, Johnson and Washington Counties. I this role I led the effort to obtain grant funding and local government approval to implement single-source courthouse entrance with security screening to Carter and Johnson Counties. We also brought video arraignment capabilities to the Johnson County Courthouse.

As chancellor, I have presided over thousands of cases since 2013. Many persons appearing in chancery court are pro-se. I know each case is significant to the person appearing in court, and I treat each citizen with respect, dignity, and patience. The most important person in the courtroom is the party appearing for his or her case-it should never be the judge. I operated under the philosophy that a judge works for the persons utilizing the court system. The conduct and fairness of the individual judge builds public confidence in the judiciary. For these reasons, it is my expectation that my leadership and administrative experience would benefit the Supreme Court.

11. Describe generally any experience you have serving in a fiduciary capacity, such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

Before I became county attorney, the local probate and juvenile courts would appoint me to serve as a guardian ad litem in conservatorships and juvenile court proceedings.

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Council.

I was privileged to serve on the Tennessee Judicial Performance Evaluation Commission. As part of our duties, the commission performed mid-term evaluations to provide input to the appellate judiciary before the election-year evaluation. The Commission also issued a 2020 election evaluation report for all Court of Appeals, Court of Criminal Appeals, and Supreme Court judges and justices appearing on the 2010 ballot. The Commission met in Knoxville, Nashville, and Memphis on many occasions to evaluate almost all of the judges and justices on the appellate bench.

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor or similar commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

On May 28, 2013, I applied with the Tennessee Judicial Nominating Commission for my current position of Chancellor for the First Judicial District. I do not recall the specific day in June 2013

when the Commission met, but my name along with two others was submitted to Governor Haslam, with my appointment occurring in August 2013.

EDUCATION

14. List each college, law school, and other graduate school that you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

Wake Forest University School of Law; Winston-Salem, North Carolina; Juris Doctor, 1994. I served as an elected representative on the Student Bar Association for each of three years. My proudest achievement was serving as Student Solicitor during the 1993-94 academic year. Each year, the rising third-year law school class selects one classmate to serve as the Student Solicitor of the Wake Forest Law School Honor Council during that student's third year. The Student Solicitor investigates and prosecutes honor code violations. During my final year, I received the North Carolina Academy of Trial Lawyers 1994 Trial Advocacy Award.

East Tennessee State University; Johnson City, Tennessee; Bachelor of Science, 1991, double major in economics and political science, *magna cum laude*; member of Omega Delta Kappa, National Leadership Honor Society, and the Honor Society of Phi Kappa Phi. I served as a Student Government Association Senator in 1989-90; President Pro-Tempore, Spring 1990; and Justice of the Student Court, 1990-91. I graduated in three years.

PERSONAL INFORMATION

15. State your age and date of birth.

I am 52 years old. I was born in Johnson City, Tennessee, on [redacted]1970.

16. How long have you lived continuously in the State of Tennessee?

I am a life-long Tennessee resident, except for the period time that I attended law school at Wake Forest Law School in Winston-Salem, North Carolina.

17. How long have you lived continuously in the county where you are now living?

I have lived in Washington County my entire life, except for the period to time that I attended law school in Winston-Salem, North Carolina.

18. State the county in which you are registered to vote.

I have been continuously registered and have voted in every primary and general election in Washington County, Tennessee, since I became eligible to vote in 1988.

19. Describe your military service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

None.

20. Have you ever pled guilty or been convicted or placed on diversion for violation of any law, regulation or ordinance other than minor traffic offenses? If so, state the approximate date, charge and disposition of the case.

No.

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No.

22. Please identify the number of formal complaints you have responded to that were filed against you with any supervisory authority, including but not limited to a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you. Please provide any relevant details on any such complaint if the complaint was not dismissed by the court or board receiving the complaint.

When I was county attorney, the Washington County Clerk and Master filed a complaint against me with the Board of Professional Responsibility. My best recollection is this occurred around 2008 and was dismissed without a finding of an ethical breach.

I have received the following complaints to the Board of Judicial Conduct: File Nos. B15-6091, B17-6950, B18-7632, B19-7788, B19-7781, B21-8414. I was required to file a response to two. All were dismissed.

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

No.

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No.

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

No.

26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices that you have held in such organizations.

Eden United Methodist Church, Jonesborough, Tennessee, lifetime member: chairman of the Church Council since 2009 and previously from 2002 to 2007; Lay Leader 1997-2001; Lay Delegate, 1991-1992; Building Committee Chairman, 2000-2005.

Tennessee Court Reporting Board, 2016 to present. I was appointed as the judicial representative to this board by Governor Haslam and reappointed by Governor Lee.

Washington County Archives and Records Commission – member, 2014-present.

27. Have you ever belonged to any organization, association, club or society that limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

    a. If so, list such organizations and describe the basis of the membership limitation.

    b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

No.

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices that you have held in such groups. List memberships and responsibilities on any committee of professional associations that you consider significant.

Washington County Bar Association, member since 1994; treasurer, 1996-1997; president, 1999.

Tennessee Judicial Conference Executive Committee, board member 2014-15, secretary 2022-23.

Tennessee Judicial Conference, Weighted Caseload Committee, member since 2018.

Tennessee Judicial Conference, special study committee on judicial resources, member 2022.

Tennessee Trial Judge Association, board member, 2020-22. Chairman of special committee on Judicial Assistant Compensation and Resources, 2020-21.

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school that are directly related to professional accomplishments.

The Business Journal of Tri-Cities Tennessee/Virginia "Forty Under 40" in 1999.

Johnson City Chamber of Commerce, Leadership 2015, Class of 2006-2007.

President of the Washington County Bar Association.

Appointment to the Tennessee Judicial Evaluation Commission.

30. List the citations of any legal articles or books you have published.

None.

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

Probate, Domestic Practice classes, First Judicial District Court Clinic Annual Law Seminar (CLE) – November 2022 and most years prior.
Judicial Writing Class – Tennessee Judicial Conference Judicial Academy for new judges, September 2022. I co-taught this class with Judge Neal McBrayer of the Court of Appeals.
Probate Practice (CLE) – Kingsport Bar Association (weekend retreat 2018).

32. List any public office you have held or for which you have been candidate or applicant.

Include the date, the position, and whether the position was elective or appointive.

Chancellor, First Judicial District, appointed by Governor Bill Haslam in August 2013, elected in 2014, and reelected in 2022.

County Attorney, as a result of the adoption of a 2012 private act creating the office of county attorney, I was elected by the Washington County Board of County Commissioners to serve as the first in-house legal counsel for Washington County.

County Attorney, appointed by the county executive and confirmed by the Board of County Commissioners of Washington County in 1999 (part-time position).

Washington County Election Commission – appointed as Republican member by the Tennessee Election Commission in 1999.

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No.

34. Attach to this application at least two examples of legal articles, books, briefs, or other legal writings that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

See attachments. These are written judgments containing findings of fact and law that are exclusively my work, except a summer clerk helped on research and drafting in the *Sullivan County v. City of Bristol* case. As to this case, I would estimate 2/3 is my work, and 1/3 is his.

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? ***(150 words or less)***

I enjoy my work as chancellor, which includes presiding over cases and working with the clerk and masters to efficiently administer the court system. I am interested in working with the entire judiciary and the Administrative Office of the Courts to implement rules and programs to see that justice is accessible and efficient. I would bring experience as a former chancellor, county attorney, and municipal judge to the Supreme Court. I am keenly interested in innovations that will empower trial judges with the resources and support to perform their work, which would benefit the citizens of the State of Tennessee. While mediation and arbitration are important, courts must innovate for efficient and effective deposition of cases so that courts remain the primary form of dispute resolution.

36. State any achievements or activities in which you have been involved that demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. ***(150 words or less)***

For several years, I was listed with Legal Aid of East Tennessee as a volunteer or reduced fee attorney for will and powers of attorney preparation. I have served as guardian ad litem on several occasions, almost always without payment. I proudly served as guardian ad litem for two World War I veterans at Mountain Home VA Medical Center. As an attorney, I handled pro bono cases or reduced fee cases for individuals of various races and individual who spoke limited or no English. I enjoyed representing several churches in Washington County by preparing contracts and handling employment matters and litigation at no charge. I also represented several volunteer fire departments and non-profit or civic organizations on various matters at no charge. Prior to serving as chancellor, I served a term on the Washington County Foster Care Review Board. I also served on the Tennessee Commission on Children and Youth, as a member from 2000-2003 and vice-chair from 2002-2003.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. ***(150 words or less)***

Justice of the Tennessee Supreme Court. My record shows my desire to contribute to the administration of justice. As a rural judge, I held court weekly in at least three of my four counties, and I worked with clerk staff and attorneys to ensure that justice was promptly delivered. As chair of the Tennessee Trial Judges Association special committee on judicial resources, I actively worked to secure the opportunity for trial judges to hire a full-time law clerk instead of a judicial secretary. While some urban judicial districts had these resources, there was no provision for law clerks in rural judicial districts. With the Supreme Court implementing this change, I am confident this resource will help all trial judges to more effectively administer their duties. I devote my energy to improving the administration of judge, and I will take this same approach to the Supreme Court bench.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? ***(250 words or less)***

I have served as a judge in mock trial competitions, I helped organize the 2022 SCALES project for high school students to see the Supreme Court at ETSU. I also organized the first National Adoption Day celebration in Northeast Tennessee and hold the celebration annually for adoptive children and families. Besides remaining active in church, in my personal life I reduced the number of organizations I joined after I became chancellor in 2013. Chancellor in the First Judicial District requires working on opinions in the evenings and on Saturdays. I am the only person who can perform the public responsibilities of the position, because I have the honor to hold the judgeship. Therefore, I decided my best means of community service was to devote my time and effort to the duties of my office. Further, this reduced potential conflicts that would require recusal. If appointed to the Supreme Court, then I will fully participate in the community service aspect of the position. Besides determining important legal questions and upholding justice, I hope to contribute to making the court system efficient and cost-effective for its users. This is where the Supreme Court can have the most impact for all Tennesseans.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Council in evaluating and understanding your candidacy for this judicial position. ***(250 words or less)***

Growing up on a fourth-generation farm defined who I am. I was the youngest of three children, and at five years old my parents introduced me to farm work with the chore of gathering eggs. My parents and grandparents together maintained 26,000 chickens. We had a routine. After school we were expected to be at the chicken houses by 4:00 p.m. We gathered eggs every day year-round. On Saturdays, we worked tobacco, hay, fed cattle, built fence, and cut firewood. I cannot assert that if I was inclined to work hard by nature, but I learned the habit. Farming taught responsibility. Farm chores were assigned, and we were required to do the work both accurately and quickly. I learned to be a good neighbor, because we helped other farmers or property owners. Farm work was hard, but I am grateful for the work ethic and sense of responsibility to others that I learned from my parents. As chancellor, I have enjoyed hearing cases in rural Tennessee, and my life experiences gives me insight to the needs of rural courts. The patience, temperament, humility, and respect for others that my parents taught me have shaped my legal and judicial career. My talents are a willingness to work hard, to thoroughly prepare for trial, and to be at ease representing all kinds of people of varying backgrounds. A good judge respects everyone – the clerks, bailiffs, litigants, attorneys – and is always mindful of the public regard and reputation of the legal profession.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. ***(250 words or less)***

Yes. In my former position of county attorney, I had for many years taken direction from the county commission or county officials on matters regardless of my personal position on issues. I am able to uphold the law when I disagree with its substance, because the supremacy of the law is an important principle that a judge must uphold. The law represents our society's judgment on a matter as reflected by legislation adopted by their representatives or by amendments to the Constitutions of the United States and the State of Tennessee. I will respect and uphold the law regardless of whether I have a personal disagreement with the substance of the law. The personal opinions of a justice on matters are properly expressed in the privacy of the ballot box and not in the justice's rulings. Legal texts, including the text of the Constitutions of the United States and the State of Tennessee, should be interpreted based on the original public meaning or understanding of the words used at the time it was adopted. Without fidelity to the original understanding of text, justices are then unmoored to find the meaning of legal text has changed over time based on changes in society. I believe it is necessary to adopt new legislation or amendments to the Constitutions to change the meaning of statutes or constitutional provisions. I will guard against substituting my opinions and beliefs for the original meaning of legal texts.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Council or someone on its behalf may contact these persons regarding your application.

A. David Bush, Attorney at Law
Norris, Bush & Byrd
[redacted]
Elizabethton, TN 37643
[redacted]

B. Mr. Ron A. Dykes
Washington County Director of Schools (retired)
[redacted]
Johnson City, TN 37604
[redacted]

C. The Honorable William L. Jenkins
Retired Circuit Court Judge of the Third Judicial District
Member of Congress 1996-2006
[redacted]
Rogersville, Tennessee 376857
[redacted]

D. The Honorable Rachel Ralston Mancl
Judge of the United States Bankruptcy Court for the Eastern District of Tennessee
James H. Quillen United States Courthouse
[redacted]
Greeneville, TN 37743-4924
[redacted]

E. Mr. Kelly Wolfe
Wolfe Development Company, co-owner
[redacted]
Jonesborough, TN 37659
[redacted]

AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Justice of the Supreme Court of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended application with the Administrative Office of the Courts for distribution to the Council members.

I understand that the information provided in this application shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Council may publicize the names of persons who apply for nomination and the names of those persons the Council nominates to the Governor for the judicial vacancy in question.

Dated: December 9, 2022.

Signature

When completed, return this application to John Jefferson at the Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

THE GOVERNOR'S COUNCIL FOR JUDICIAL APPOINTMENTS
ADMINISTRATIVE OFFICE OF THE COURTS

511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information that concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the State of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Governor's Council for Judicial Appointments to request and receive any such information and distribute it to the membership of the Governor's Council for Judicial Appointments and to the Office of the Governor.

John C. Rambo
Type or Print Name

Signature

9 December 2022
Date

016864
BPR #

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.

Chancery Court for the First Judicial District
at Washington County, Tennessee

William Lee Runion, Jr. Plaintiff, v. Dianna Lynn Mashburn Runion, Defendant.	Civil Action No. 19-DM-0322 Rule 58 Order

Ruling of Chancellor Rambo:

This cause of action was filed on April 30, 2019, on a Complaint by Mr. William Lee Runion, Jr. ("Husband") seeking a divorce from his wife, Mrs. Dianna Runion ("Wife"), on the basis of irreconcilable differences. On May 10, 2019, Mr. Runion amended his Complaint to allege he should be granted a divorce based on wife's inappropriate marital conduct. Mrs. Runion also wants a divorce, but she disagrees that fault lies with her. On May 23, 2019, Mrs. Runion filed her answer to the Complaint, as amended, and filed her own Counter-Complaint seeking a divorce from Mr. Runion on the grounds of his inappropriate marital conduct and adultery.

In response, on June 14, 2019, Mr. Runion denied that Mrs. Runion had any ground for divorce from him other than irreconcilable differences that had arisen. Irreconcilable differences could not serve as a basis for their divorce, because the parties never

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at 1:35 P.M.
Sarah Lawson, Clerk and Master

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entered into a marital dissolution agreement. The case was tried on August 17-18 and September 30, 2020.

1. Award of Divorce

When a ground for divorce has been stipulated or proven, the trial court may award a divorce to a party less at fault or declare the parties divorced; such choice is left to the trial court's discretion. Tenn. Code Ann. § 36-4-129(b) (2001); *see also Crowell v. Crowell*, No. E1999-00348-COA-R3-CV, 2000 Tenn. App. LEXIS 370, at *28 (Tenn. Ct. App. May 30, 2000).

Prior to the filing of the divorce complaint, the parties' relationship had disintegrated and their love and affection had been extinguished. The Court finds that neither husband nor wife engaged in any singular or pattern of conduct that caused mental anguish and distress to the other. Of course, when Husband's adultery became known, this caused much anguish and distress to Wife. Husband committed adultery with Mrs. Holly Davis, and he admitted the ground for divorce. This is the more relevant ground for divorce as emphasized by the focus of the evidence and testimony presented by Mrs. Runion.

Although his testimony was cummulative and unnecessary, Mrs. Runion subpoenaed and called Mr. Roger Davis to testify in this trial. In his humiliating testimony, he acknowledged what everyone in the courtroom already knew, that his wife, Holly Davis, had broken her marriage vows by engaging in an adulterous relationship with Will Runion.

As adultery is a separate ground alleged by wife, the Court finds that Mrs. Runion is entitled to divorce from Mr. Runion based his

adultery, and his claim against her for divorce alleging inappropriate marital conduct is dismissed.

2. Determination of Separate and Marital Property

"Tennessee is a 'dual property' state because its domestic relations law recognizes both 'marital property' and 'separate property.'" *Snodgrass v. Snodgrass*, 295 S.W.3d 240, 246 (Tenn. 2009); *See* Tenn. Code Ann. § 36-4-121. Separate property is not part of the marital estate and is therefore not subject to division. *See Cutsinger v. Cutsinger*, 917 S.W.2d 238, 241 (Tenn. Ct. App. 1995). In contrast, marital property must be divided equitably between the parties based on the relevant factors enumerated in Tennessee Code Annotated section 36-4-121(c) without regard to fault on the part of either party. Tenn. Code Ann. § 36-4-121(a)(1). Section 36-4-121(a)(1) requires an *equitable* division of marital property, not an *equal* division. *Robertson v. Robertson*, 76 S.W.3d 337, 341 (Tenn. 2002)(emphasis added).

Tennessee Code Annotated section 36-4-121(b)(1) provides the following definition of marital property, in pertinent part:

> (1)(A)"Marital property" means all real and personal property, both tangible and intangible, acquired by either or both spouses during the course of the marriage up to the date of the final divorce hearing and owned by either or both spouses as of the dateeof filing of a complaint for divorce, except in the case of fraudulent conveyance in anticipation of filing, and including any property to which a right was acquired up to the date of the final divorce hearing, and valued as of a date as near as reasonably possible to the final divorce hearing date. In the case of a complaint for legal separation, the court may make a final disposition

of the marital property either at the time of entering an order of legal separation or at the time of entering a final divorce decree, if any. If the marital property is divided as part of the order of legal separation, any property acquired by a spouse thereafter is deemed separate property of that spouse. All marital property shall be valued as of a date as near as possible to the date of entry of the order finally dividing the marital property.

(B)"Marital property" includes income from, and any increase in value during the marriage of, property determined to be separate property in accordance with subdivision (b)(2) if each party substantially contributed to its preservation and appreciation, and the value of vested and unvested pension, vested and unvested stock option rights, retirement or other fringe benefit rights relating to employment that accrued during the period of the marriage.

(C)"Marital property" includes recovery in personal injury, workers' compensation, social security disability actions, and other similar actions for the following: wages lost during the marriage, reimbursement for medical bills incurred and paid with marital property, and property damage to marital property.

Tennessee Code Annotated section 36-4-121(b)(2) provides the following definition of separate property, in pertinent part:

(A) All real and personal property owned by a spouse before marriage, including, but not limited to, assets held in individual retirement accounts (IRAs) as that term is defined in the Internal Revenue Code of 1986, compiled in 26 U.S.C., as amended;

(B) Property acquired in exchange for property acquired before the marriage;

(C) Income from and appreciation of property owned by a spouse before marriage except when characterized as marital property under subdivision (b)(1);

(D) Property acquired by a spouse at any time by gift, bequest, devise or descent;

(E) Pain and suffering awards, victim of crime compensation awards, future medical expenses, and future lost wages; and

(F) Property acquired by a spouse after an order of legal separation where the court has made a final disposition of property.

The parties have three Farm Bureau life insurance policies that are in the name of husband. The policies have a cash value of $6,181.45 on the policy designated for Ivy, $6,697.24 for the policy designated for Alley, and $7,929.02 for the policy designated for Lexi. These policies belong to each respective child.

There is a condominium in Johnson City that has a value of $97,000. This property is titled as owned by Mr. Runion, his father and his sister. The couple did some renovations and light remodeling, mainly painting and replacing some fixtures, changing light fixtures and painting cabinets. But the couple did not spend their money on this work, and the work by Wife was not sufficient to cause Husband's interest in the property to become transmuted into marital property. Mr. Runion's father bought this condominium to provide housing for his grandchildren when they

attended East Tennessee State University. Will Runion's interest in this condominium is his separate property.

Mr. Runion's father, William Runion, Sr. (also known as Bill Runion) owns various farms in Washington County. All of these farms are titled in Bill Runion's name. He owns property at 269 Vent Road, which is referred to as the Martin Farm. There are cattle and hayfields and one residence on the farm. It generates $750 per month in rent.

There is a farm on Bailey Bridge Road referred to as the Brown Farm. There is a double-wide mobile home located on it that generates $600 a month in rent. There is pasture for cattle on this farm.

The Dunbar Farm is on Frank Stanton Road. It is maintained for hay production and cattle pasture. There are several sheds and most of the farming equipment is stored on this property. The cattle shed and cattle chute is located there. There are two houses on this farm. One is a rental trailer that generates $550 in monthly rent. The other is a home where a farm worker lives rent-free. This is part of his compensation package.

There is a farm on Brobeck Hill Road designated as the Fox Farm. The rental housing on the farm generates $600 per month, and the farm is used for pasture and cattle grazing.

There is also the Brobeck property on No Fattie Road in Limestone, Tenn. It has a rental house that generates monthly rental income of $400 a month.

Another farm is the Gouge Callahan Farm on Bricker Lane. It has two rental houses. One is vacant and the other rents for $500 per month. Bill Runion is in the process of offering this farm for sale.

All of these farms are deeded in Bill Runion's name. They are neither the separate property of the husband nor marital property of this couple. Further, Bill Runion was not a party to this lawsuit. Bill Runion has not gifted any of his farms to his son or daughter-in-law.

Will Runion manages several farms owned by his father. As part of his farm management, Will Runion implemented a cattle replacement program for the herd already owned by Bill Runion. This program replaces the older cows with the most-promising heifers in the herd. To implement the program, Mr. and Mrs. Runion would buy the bulls and would rotate them every three to four years. Bill Runion continued to own the rest of the herd (the calves, heifers, steers and cows).

Bill and Will Runion sell calves during the spring from April to May and in the fall—usually around October or November. Calves are usually sold when they weigh between 400 to 450 pounds. The bull calves are sold along with proximately three-quarters of the heifer calves. The other quarter of the heifer calves are kept as replacements for the older or less desirable cows that are culled from the herd. Based on persuasive testimony, the Court finds there are 396 beef cattle at Bill Runion's farms.

The Court finds that except for the bulls, the balance of the herd is owned by Bill Runion. He has insured the herd since 2008. He owned all of the cattle before the replacement program. Only one-fourth of the calves are retained by the Bill and Will Runion to replace the cows; essentially, the proceeds from the sale of the rest of the cattle were given to Will Runion or the proceeds from the sale of the cattle were split between Bill Runion and the couple. Bill Runion always received heifers to replace his culled

cows. Accordingly, the size of Bill Runion's cattle herd has remained stable. Bill Runion has paid or gifted his son the balance of calves to compensate him for his work on the farm, but the herd has remained intact under the ownership of Bill Runion. The Court was persuaded by the testimony of Bill Runion in this regard. Bill Runion never sold his herd to his son. He has maintained ownership and he replaced his old cows with the portion of heifer calves he retained.

The couple owns five bulls now, and they are marital property worth $12,500. Husband's father allows him to receive some of the income from selling cattle, but the father claims ownership of them. Bill Runion owns the herd, except for the five bulls. He pays for the insurance policy that covers the herd. Bill Runion compensates his son for working at the farm and managing the herd by allowing him to receive some of the money from the periodic sale of a portion of the herd. What he has not done is gifted the herd to his son, as the gifts or payment by receipt of cattle sale proceeds occurs at the time the cattle are actually sold. The breeding of the cattle by the couple's bulls did not persuade the Court that the resulting offspring became the marital property of the couple.

Will Runion and his sister jointly owned mountain property in North Carolina, which was a gift to them from Bill Runion. This property has been sold, and $8,796.49 is Will Runion's portion of the property sale proceeds. The money is Will Runion's separate property, as there is no evidence to indicate that it has been transmuted to create a marital interest in the property.

The Toro UTV is wife's separate property worth $5,000. It was a gift to her from her husband.

Runion Premium Beef Enterprise was a business started by Will Runion and the couple's son-in-law. It is non-functioning and has no value.

The new Holland Compact Tract Loader was purchased by Bill Runion and is worth $50,000; it is Bill Runion's property. The couple's marital property includes a 1995 RV that is worth $26,000. The 2005 Polaris ATV was used by the parties' children. It is gone. The parties have a Polaris utility vehicle worth $3,000; it is marital property.

There are two F350 farm use trucks that are marital property. The 2012 model is worth $25,000, and the 2011 model is worth $18,000. The Chevrolet Tahoe is driven by her, and it is marital property worth $33,300, and he drives a 2015 Ford F350 truck that is marital property. It is worth $33,390.

There is more marital farm equipment. There are two Kuhn hay tedders worth $3,600. The 500-gallon agriculture sprayer is worth $1,800.

There was no persuasive testimony that the farms' inventory of hay, straw or alfalfa is marital property. Bill Runion allows his son to earn money from the sale of hay harvested from Mr. Runion's farms. This further highlights the arrangement between Bill and Will Runion that financially benefits Will Runion.

Bill Runion is a generous individual to his family. He has provided the money to educate his grandchildren and at least two of the children of these parties, he has contributed $20,000 each towards the purchase of vehicles for the parties' children and has provided housing for them when they attended college.

The Subaru driven by Allie was a gift to her using Bill Runion's money. It is worth $18,000. The Subaru Cross track driven by Ivy is her car that was given to her using $20,000.00 provided by Bill Runion.

The fifth-wheel trailer is not owned by the parties, it belongs to DryCore or Bill Runion. The wheel rake belongs to Bill Runion. There was no testimony the couple owned any scales related to farm operations. There is one Toro mower owned by the couple, and it is used by Tyler. It is worth $2,700. There was no persuasive testimony to determine if the couple own some tractor weights.

The Court finds that the 16-foot trailer is marital property worth $2,250. The marital property further consists of a 2012 Homesteader trailer worth $1,000.00. More martial property includes an 8-foot box trailer, a 14-foot cattle trailer, 5 x 8 trailer. They are worth $630, $1,800, and $600, respectively. The 14-foot dump trailer is worth $8,100, and it is marital property.

Bill Runion provided large sums at Christmas and birthdays to his son and he would often provide the couple with money to help pay bills. As to gifts, Will Runion would receive $5,000 on his birthday and $13,000 for Christmas.

Plaintiff generally will receive $30,000 per year in financial gifts from his father. This changed in 2020 and he received a loan instead. The loan was to avoid Mrs. Runion from receiving any interest in the funds provided by Bill Runion to his son.

As to the farm operations, Bill Runion has turned over the operation of the farm to his son. Will Runion has been managing the farms since 2010. He has not deeded any land to the couple.

When the farms are sold, Will Runion does not receive payment from the sale of land. In exchange for Will Runion vaccinating, caring for the cattle, managing the cattle, providing the oversite and labor to harvest hay, Bill Runion has generously allowed Mr. Will Runion to keep proceeds from cattle sales not related to maintaining the herd. In other ways, Bill Runion subsidizes his son. He will allow Will Runion to trade his farm equipment for new farm equipment. The son depreciates the new equipment.

Wife asserted that marital funds have been spent on Bill Runion's property, whom she does not particularly like. This includes three HVAC units installed in rental homes. They are worth $4,500. As to the rental properties, Bill Runion pays for the major renovations while the smaller expenses are paid from the rental income and collected by Will Runion. The parties disputed the significance of the investments the couple have made into the rental properties. Defendant asserts this activity and course of conduct indicates the couple own a rental business that her expert valued at $606,904. Plaintiff denies a marital rental business exists.

There was no dissipation of marital assets by investing money in Bill Runion's property. The money spent did not add significantly to the value of the homes but were more associated with general maintenance and upkeep. The couple used his father's assets to earn income for them. Frankly, they received far more money in rental income from Mr. Runion's property than what they spent on his properties.

Marital funds were not spent subsidizing or enhancing the estate of husband's father. Rather, they were minimal expenses related to the management of rental properties and the farm, and Bill

Runion allowed his son and daughter-in-law to receive the benefit of the farms and the rental homes located on them. It was simply part of their arrangement that they would expend some of their labor and a minimal amount of their money in managing the rental properties and in return they received all of the rental income. This was an expense of business and the expenditure of these minimum expenses greatly benefited the couple in supplementing their income.

Finally, their investment of labor and money was not to enhance the properties of their father for a future expected inheritance; rather, it was simply sharing of some of the expenses when they benefited from all of the income. They were essentially property managers for Bill Runion. They did not have a business, they had jobs working for Bill Runion.

The testimony of Robert Gibson was helpful. He confirms, and the Court so finds, that marital assets and money have not been diverted to Mr. Runion's father. He also confirmed that Bill Runion subsidizes the farming operations of Will Runion. Although Bill Runion gave $20,000.00 in May 2020 to Will Runion, with a note requiring repayment, the Court is of the opinion this will eventually become a gift and it was not gifted outright because of the pendency of the divorce. It is Will Runion's separate property and any repayment obligation is his alone.

The Court heard from Mr. Chris Ideker, a financial forensics expert. His testimony was unpersuasive. Although he is accurate that the Runions have what would appear in the business world as an unusual arrangement to the benefit of Will Runion, his opinion fails to account that it is a family-owned farm with an arrangement between a son and a father with the father lavishing

his family. The evidence was not persuasive that Bill Runion has gifted rental properties, cattle, or hay to Will Runion. What is persuasive, is that he allows Will Runion to receive the funds from hay, rental homes and cattle because he is operating the farm instead of Bill Runion. The best description for this arrangement is that Bill Runion is simply uninterested in receiving the majority of the income or profits from his farms for himself. He is content to let his son receive that benefit, and he is providing a job to his son.

There is no rental business to allocate between the husband and wife. If there was a business, it has no value as it is closely held and the business has no assets. There is no contract with Will Runion to maintain these properties in the future. These were benefits gifted and payments to Will Runion by Bill Runion for his family, and the divorce represents a dissolution of one member from the family. It was clear that Bill Runion is disinterested in bestowing gifts upon his ex-daughter-in-law. Mrs. Runion was unpersuasive that rental income from property owned by her father-in-law is a rental business owned by the couple. The present value of the long-term rental potential of homes on land owned by Bill Runion is not an asset subject to marital division.

Finally, any future, potential inheritance expected by Will Runion is not a present marital asset or separate property of Husband.

The air compressor is wife's separate property. She received it from her father. The milk glass collection worth $250 is her separate property that she received as gifts or inherited. The pewter collection consists of gifts made to her; it is her separate property worth $350. The table and baby cradle worth $350 were a gift to

her from Will Runion; it is her separate property. The small chain saw was gifted to her from Will Runion; it is her separate property. The mobile home was a gift to her, and it is her separate property, it is worth $2,500.

As to the guns and firearms, they are primarily gifts received by Plaintiff from his father and grandfather. They remain his separate property except a 22 LR rimfire rifle worth $150 that is marital property. It is awarded to Plaintiff.

There are multiple whole life insurance policies. These are referenced by the last four digits of the policy. Northwestern Mutual Life Insurance ("Northwestern") policy #4407 has a value of $20,887. Northwestern policy #1974 has a value of $6,752. Northwestern policy #1476 is worth $2,022. Northwestern policy #4418 has an accumulated value of worth $29,428, but it has a debt of $28,743 associated with it. Therefore, the value is $685. Northwestern policy #1532 is worth $38,198. Northwestern policy #2468 is worth $7,824. Northwestern policy #1926 is worth $19,178. Northwestern policy #1951 is worth $2,704, and Northwestern policy #1503 is worth $1,893. They are all marital property.

There is a brokerage account (#6277) at Northwestern Mutual worth $10,482. It is marital property.

3. Division of Marital Property

After classifying what property is marital and separate property, the Court must make an equitable division of marital property. In making an equitable division of marital property, Tennessee Code Annotated section 36-4-121(c) requires the consideration of the following relevant factors:

(1) The duration of the marriage;

This marriage is long and favors a more equal division of property.

(2) The age, physical and mental health, vocational skills, employability, earning capacity, estate, financial liabilities and financial needs of each of the parties;

The parties are essentially equal in age and are similar in good physical and mental health. His veterinary degree provides more opportunities than her nursing skills. They both have the ability to apply their vocation to earn income, but his earnings potential is greater. This factor favors Wife receiving more from the division of property.

(3) The tangible or intangible contribution by one (1) party to the education, training or increased earning power of the other party;

Bill Runion assisted the parties in having sufficient money and assets to live comfortably during the marriage. He helped both parties with tuition expenses. Mrs. Runion did work part-time to assist the couple while Plaintiff was in veterinary school in Knoxville. Viewing the entirety of the marriage, neither party made a significantly higher contribution to the betterment of the other. The factor does not favor one party receiving more marital property than the other.

(4) The relative ability of each party for future acquisitions of capital assets and income;

Will Runion will be able to acquire more capital and assets and income in the future because of his business arrangement with his father, his veterinarian degree, and his farm and cattle

management skills. She has the ability to increase her earning capacity, if she is more flexible in pursuing work with employers who pay more. However, he will maintain an advantage because his father provides him with more opportunities than Mrs. Runion will expect in the workforce. The factor favors Wife receiving more marital property.

(5) The contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker, wage earner or parent, with the contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled its role;

The parties contributed equally to the marriage. They both participated in household responsibilities, child-rearing and income earning. There was no dissipation of marital or separate property. This factor does not favor one party receiving a higher share of marital property than the other.

(6) The value of the separate property of each party;

There is no significant separate property that each former spouse retains. This factor does not favor one party receiving a higher share of marital property than the other.

(7) The estate of each party at the time of the marriage;

The estate of each party at the time of the marriage was not explored at trial. It appears it was minimal from what testimony the Court received. This factor does not favor one party receiving a higher share of marital property than the other.

(8) The economic circumstances of each party at the time the division of property is to become effective;

She will need to find a home, and he has access to a home provided by his father. He presently earns more money than her. This factor suggests Wife receiving a higher share of marital property.

(9) The tax consequences to each party, costs associated with the reasonably foreseeable sale of the asset, and other reasonably foreseeable expenses associated with the asset;

There was no evidence introduced as to the tax consequences to each party from a division of marital property.

(10) The amount of social security benefits available to each spouse; and

There was no evidence introduced as to social security benefits available to either party.

(11) Such other factors as are necessary to consider the equities between the parties.

Husband has long been accustomed to receiving financial assistance from his father. It is his father who makes his farming income sufficient for him to earn a living, but this has been accounted for in the factor concerning the ability for each party to acquire future capital assets and income. Accordingly, this is not a separate factor that was considered apart from Tennessee Code Annotated Section 36-4-121(c)(4).

Considering all factors, it is right for Mrs. Runion to receive more marital property than Will Runion.

Having made the determination that Mrs. Runion should receive more marital assets, the Court's allocation follows. Mrs. Runion filed her 2019 tax return as single instead of married filing

separately. This qualified her for two tax credits, and she received a tax refund of $8,509.00 instead of $1,184.00. The difference between the numbers is marital property, but it is awarded to her.

As discussed earlier, the three Farm Bureau life insurance policies are awarded to their daughters as they were funded by Bill Runion, and the couple agree they should go to their children. The same applies to the Subaru automobiles.

Mrs. Runion has used $4,000 in marital funds to pay her attorney. Those funds are awarded to her. She has also incurred an additional $7,041 in attorneys' fees, which Will Runion has paid. Mrs. Runion is not required to reimburse Mr. Runion for the payment of these attorney fees.

As to the Voya account, it is marital property worth $6,713, and it is awarded to Mrs. Runion. There are $502 and $558 in Clinchfield savings accounts, and these marital funds are awarded to Mrs. Runion. There was no persuasive evidence of any CCU accounts. There is a Bank of Tennessee money market account worth $802. It is marital property awarded to Mrs. Runion. There is a marital farm account that is worth $4,727. From this account, $2,500 is awarded to Mrs. Runion and Mr. Runion shall disburse this amount to Mrs. Runion, and the balance is awarded to him.

The Bank of Tennessee accounts titled in Allie and Ivey's names are the property of Allie and Ivey. The Bank of Tennessee joint account is worth $52, and it is awarded to Mrs. Runion. There was no persuasive evidence regarding marital cash held by either party. There was no persuasive evidence regarding a Mountain Commerce Bank account that was marital property.

All of the life insurance policies with Northwestern are awarded to Mrs. Runion, except policy number 17394418 and the loan against it is awarded and assigned to Will Runion.

The Northwestern brokerage account worth $10,482 is awarded to Mrs. Runion.

The Court was not persuaded that Will Runion is expected to repay a $20,000 loan to Bill Runion. But to the extent there is a loan, it is assigned to Will Runion, and he shall hold Mrs. Runion harmless.

The two Ford F350 farm use trucks worth $25,000 and $18,000 are awarded to Husband. The Chevrolet Tahoe worth $33,300 is awarded to Wife. The 2015 Ford F350 truck worth $33,390 is awarded to Husband.

The two Kuhn hay tedders worth $3,600 are awarded to him. The 500-gallon agriculture sprayer worth $1,800 is awarded to him. The Toro mower worth $2,700 is awarded to her.

The 16-foot trailer worth $2,250 is awarded to him. The 2012 Homesteader trailer worth $1,000 is awarded to her. The 8-foot box trailer worth $630, 14-foot cattle trailer worth $1,800, and the 5 x 8 trailer worth $600 are awarded to him. The 14-foot dump trailer worth $8,100 is awarded to him.

The 1995 Monoco Motor home worth $26,000 is awarded to her. The 2004 Polaris utility vehicle worth $3,000 is awarded to him.

The five bulls are worth $12,500, and they are awarded to him.

Mrs. Runion is awarded the golden doodle dog named OZ. The pots, pans and dishes are awarded to her. They are worth $750.

She is awarded the table, aquarium holder, and the cradle, which was marital property. They are worth $300.

There are 125,333 airline miles, which are marital property, and they are awarded equally to Husband and Wife. They are worth $4,000. The BonVoy Hotel points are worth $1,798, and they are awarded to Wife.

The fishing lures are marital property and have a value of $500, and they are awarded to Mr. Runion. The home décor is marital property worth $400, and these items are awarded to Mrs. Runion. Unless otherwise designated, the furniture and antiques are marital and awarded to Mr. Runion. This furniture is worth $1,500. The antiques are worth $2,500.

The tools and shop contents are marital property worth $9,000, and they are awarded to Mr. Runion.

Any account or debt not specifically mentioned above shall be the property of the titled owner.

4. Alimony

Defendant requests alimony from Plaintiff. Tennessee recognizes four distinct types of spousal support: (1) alimony *in futuro*, (2) alimony *in solido*, (3) rehabilitative alimony, and (4) transitional alimony. Tenn. Code Ann. § 36-5-121(d)(1). Alimony *in futuro*, a form of long-term support, is appropriate when the economically disadvantaged spouse cannot achieve self-sufficiency and economic rehabilitation is not feasible. *Gonsewski v. Gonsewski*, 350 S.W.3d 99, 107 (Tenn. 2011). Alimony *in solido*, another form of long-term support, is typically awarded to adjust the distribution of the marital estate and, as such, is generally not modifiable and does not terminate upon death or remarriage. *Id.* at

108. By contrast, rehabilitative alimony is short-term support that enables a disadvantaged spouse to obtain education or training and become self-reliant following a divorce. *Id.*

The General Assembly favors rehabilitative or transitional alimony rather than alimony in futuro or in solido. *See* Tenn. Code Ann. § 36-5-121(d)(2) to (3); *Gonsewski*, 350 S.W.3d at 109. When economic rehabilitation cannot occur, transitional alimony may be awarded. Rehabilitative alimony "is designed to increase an economically disadvantaged spouse's *capacity* for self-sufficiency," whereas "transitional alimony is designed to aid a spouse who already possesses the capacity for self-sufficiency but needs financial assistance in adjusting to the economic consequences of establishing and maintaining a household without the benefit of the other spouse's income." *Id.* Transitional alimony assists the disadvantaged spouse with the "transition to the status of a single person." *Id.* at 109 (internal quotation marks omitted).

Although the parties' standard of living is a factor the Court must consider when making alimony determinations, *See* Tenn. Code Ann. § 36-5-121(i)(9), the economic reality is that the parties' post-divorce assets and incomes often will not permit each spouse to maintain the same standard of living after the divorce that the couple enjoyed during the marriage. *Gonsewski*, 350 S.W.3d at 113.

Decisions regarding the type, length, and amount of alimony turn upon the unique facts of each case and careful consideration of many factors, including, but not limited to, the statutory factors found at Tennessee Code Annotated section 36-5-121(i). The pertinent factors include and are analyzed as follows:

(1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;

Husband presently earns more money than Wife. Because of generous depreciation opportunities on the farm that his father has enabled, the income subject to taxation of Plaintiff is substantially less than his actual income. Further, his income is supplemented by gifts from his father averaging $20,000.00 per year. The son receives the income from the rental houses. Based on the testimony of the parties and experts and review of the exhibits, this Court finds that Will Runion's income is $60,000 per year, and this does not include the direct monetary gifts received by Husband from Mr. Bill Runion.

The parties have minimal debts but little savings for retirement. Planning for retirement was not a concern of Husband, as he holds the expectation that he will receive substantial farming assets upon his father's death. As a couple, they had jointly planned for retirement security on this expectation. Now, Wife is without a retirement scheme as she nears retirement age. Bill Runion is a continuing source of financial security for Husband. Somewhat countering these financial shortcomings of Wife, she will have financial resources in the form of marital property worth more than $200,000. This factor favors Wife receiving an award of alimony.

(2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earning capacity to a reasonable level;

There is no necessity to secure education or training for either party. Both have professional licenses. However, Mr. Runion is a veterinarian who can increase his income, and his farming income presently exceeds Wife's income. She has the ability to increase her nursing income by broadening her willingness to seek other nursing employment, but she will remain at a disadvantage to him. This factor favors Wife receiving alimony.

(3) The duration of the marriage;

The marriage was relatively long. This factor favors Wife receiving alimony.

(4) The age and mental condition of each party;

The ages and mental condition of each party is similar. This factor does not favor Wife receiving alimony.

(5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;

Wife has no physical impairments that preclude her from a successful nursing career. There was no persuasive evidence that Wife is unable to work and earn income because of age, physical impairment, or mental condition. She is working now in her chosen career. Wife is considered a valuable and effective employee at her current workplace. This factor does not favor Wife receiving alimony.

(6) The extent to which it would be undesirable for a party to seek employment outside the home, because such party will be custodian of a minor child of the marriage;

The children are grown and independent of their parents. This factor does not favor Wife receiving alimony.

(7) The separate assets of each party, both real and personal, tangible and intangible;

Wife does not have significant separate assets, while Husband has more than $110,000 in separate property. This factor slightly favors an award of alimony to Wife.

(8) The provisions made with regard to the marital property as defined in section 36-4-121;

Wife will receive significantly more marital property than Husband. This factor suggests less alimony is necessary, if alimony is awarded.

(9) The standard of living of the parties established during the marriage;

There was no persuasive evidence of a high standard of living enjoyed by the parties. They were fairly modest in their spending. There was no persuasive evidence offered relating to whether the parties enjoyed extravagant vacations, frequented expensive stores, enjoyed expensive entertainment, purchased expensive gifts, enjoyed country clubs, drove luxury automobiles, or enjoyed extensive services such as household help. They acquired neither collectibles or artwork. Finally, they did not enroll their children in private schools, camps, tutoring or expensive extracurricular activities. The lifestyle of the parties was enhanced by gifts and assistance received from Bill Runion. However, If Wife is to receive alimony, a large sum is not necessary to maintain an extravagant lifestyle to which she had become accustomed.

(10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;

Wife did make some contribution to her Husband's education, training, or increased earning power as she worked while he attended veterinary school. Both parties contributed to managing the parties' household throughout the marriage. This factor favors Wife receiving alimony, if she has a need for alimony.

(11) The relative fault of the parties, in cases where the court, in its discretion, deems it appropriate to do so; and

As a result of Husband's adultery, the fault for this divorce was assigned to him. The Court was persuaded that the parties' plans for retirement was significantly dependent on Husband's hoped-for-inheritance. This is not surprising as her father-in-law has contributed mightily to the financial well-being of the couple and their family for many years. As a result of the breakdown in the marriage, Wife will not receive any benefit from Husband's potential future inheritance. Because of this potential intangible benefit that Wife lost because of Husband's adultery, justice requires application of the relative fault factor, and it favors an allocation of alimony to Wife.

(12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

The parties presented no pertinent evidence regarding tax consequences regarding an award of alimony. Accordingly, this factor is not applicable to determining an alimony award.

Applying these factors, the Court recognizes the two most important factors, however, are the disadvantaged spouse's need and the obligor spouse's ability to pay. *Gonsewski*, 350 S.W.3d at 109-10. Wife has income, and she will receive substantially more marital assets. She has and continues to work due to employable skills and excellent work ethic. She has no need for rehabilitation, as she has her professional credentials necessary to continue her nursing career.

There is no need for transitional alimony, because Wife is receiving sufficient marital assets that will provide for transitional needs. However, the marital assets received are not substantial enough to meet her long-term needs. She does not have a home, and there is little doubt husband will continue to live in a home provided by his father. She has little retirement, and he has a high likelihood of continuing to benefit from his father's farmland holdings and rental homes.

Husband is not maximizing his present individual income potential, which he could by working fulltime as a veterinarian. Understandably, he is maximizing his future inheritance by managing his father's farms and cattle herd. What has been referred to as the couple's future retirement, if it materializes, is no longer subject to being shared with his former wife. To the extent she would have benefited from being the spouse of a farmer with considerable land, rental homes, equipment and cattle, that ended with the divorce filing. Long-term, Wife will suffer more financially from this divorce than Husband.

Alimony *in futuro*, a form of long-term support, is appropriate when the economically disadvantaged spouse cannot achieve self-sufficiency and economic rehabilitation is not feasible.

Mrs. Runion's statement of expenses on her Rule 9 statement are exaggerated or will be reduced. For example, she has sufficient marital assets to pay her credit card bill. This eliminates a $250 per month expense. She is not required to make charitable contributions and her grocery budget of $600 for one person could be reduced. Her estimated housing expenses is slightly elevated. Mrs. Runion's income is presently $2,768, but the testimony is persuasive that she should make at least $3,000 per month. After reducing her expenses, a gap between income of $3,000 per month and her monthly expenses remains. It is unfair her to continually use the money from her allocation of marital assets to cover an insufficiency of income to cover her expenses, especially since she has no other retirement savings.

As to the here and now, alimony in the amount of $425 per month is necessary to assist her. Her expenses are realistically approximately $3,300 and her payment of taxes on her earnings leaves a gap of $400 to $500 per month that her income at $3,000 per month before taxes will not cover. After reducing her Rule 9 budget for things that are not discretionary, such as charitable gifts and a large grocery budget, and factoring that her income should reach $3,000 per month relatively easily, she still has a need for some long-term assistance.

His Rule 9 budget is also skewed by his farming tax advantages and the support of his lifestyle by his father. He has the ability to pay her $425 per month. Hers is a long-term, alimony *in futuro* need.

Applying all of the factors regarding alimony, this is not a case where the disadvantaged spouse is wholly dependent on the former spouse to meet her financial needs. But it is unlikely that she will ever progress sufficiently in her career to match Husband's income, although that is not the purpose of alimony. But it does highlight the economic disadvantage she has compared to him. Alimony *in futuro* of $425 per month is awarded to Wife beginning May 1, 2021, and due the first of each month thereafter. This award of alimony will cease when triggered by the provisions of law regarding such.

5. Attorney Fees

An award of attorneys' fees in a divorce action constitutes alimony in solido. *Wilder v. Wilder*, 66 S.W.3d 892, 894 (Tenn. Ct. App. 2001). An award of attorneys' fees is to be based upon a consideration of the factors set forth at Tennessee Code Annotated section 36-5-121(i), and is appropriate when the spouse seeking them does not have adequate funds to pay his or her legal expenses. *Yount v. Yount*, 91 S.W.3d 777, 783 (Tenn. Ct. App. 2002). "It is considered most appropriate where the final decree of divorce does not provide the obligee spouse with a source of funds, such as from property division or alimony *in solido*, with which to pay his or her attorney." *Id.* (citing *Houghland v. Houghland*, 844 S.W.2d 619 (Tenn. Ct. App. 1992)). Tennessee courts have found an award of attorney fees to be most appropriate where the disadvantaged spouse does not have enough liquid assets to pay his or her own attorney fees and the obligor spouse is able to pay. *Yount*, 91 S.W.3d at 783; *Manis v. Manis*, 49 S.W.3d 295, 307 (Tenn. Ct. App. 2001); *Lindsey*, 976 S.W.2d at 181.

Wife has been provided with a sufficient source of funds to pay her attorney's fees—life insurance policies. She has received assets sufficient to pay her attorney and her expert, and she has minimal debts.

6. Court Costs

Plaintiff caused the divorce, so court costs are taxed to Plaintiff.

Clerk and Master, serve this judgment on the parties.

All of this is So Ordered, this 23rd day of April 2021.

John C Rambo

Chancellor John C. Rambo

Certificate of Service

I, Sarah Lawson, Clerk & Master, do hereby certify that I have mailed a true and exact copy of the foregoing Rule 58 Order, postage prepaid, as follows:

SARAH SHULTS, ESQ.
P.O. BOX 129
ERWIN, TN 37650

MCKENNA COX, ESQ.
P.O. BOX 1160
JOHNSON CITY, TN 37605

DATED: Friday, April 23, 2021

Debi Cutlip

Sarah Lawson, Clerk & Master
By Deputy Clerk and Master

Chancery Court for the First Judicial District
at Carter County, Tennessee

Deborah Bartley and Delilah Nunley, Plaintiffs, v. Tiny Nunley (individually and administer of estate of Anthony Nunley) Defendants.	Case No. 29844 **Order**

Ruling of Chancellor Rambo:

Procedural History

The Plaintiffs, Deborah Bartley and Delilah Nunley, initially filed a complaint on July 6, 2017, seeking a partition of the property by sale pursuant to Tennessee Code Annotated section 29-27-10. The Defendant, Tiny Nunley (individually and as Administratix) filed a motion to dismiss, a motion for stay, and a motion to post bond. The defendant also filed a "Complaint to Reform Deed and Quiet Title" in the probate proceeding. The Defendant filed a motion to dismiss the "Complaint to Reform Deed and Quiet Title" in the probate proceeding. The Chancery Court transferred the quiet title complaint from the probate proceeding to the chancery proceeding. The quiet title complaint was treated as the Compulsory Counterclaim of Tiny Nunley to the complaint for partition filed by Plaintiffs in

FILED THIS 17 DAY OF July 2019 AT 8:30 O'CLOCK A.M.
MELISSA MORELAND
CLERK AND MASTER

EXHIBIT 1

Chancery Court. The Chancery Court denied the motion to post bond and the motion to stay.

Plaintiffs filed a motion in limine on February 6, 2019, regarding admissibility of certain evidence. The Plaintiffs requested a ruling from this Court that all parol or extrinsic evidence be inadmissible to construe and interpret the 2000 Warranty Deed and the title conveyed to the grantees. Plaintiffs moved that no testimony be allowed in relation to following exhibits: Exhibit 2 (Contract to Purchase Real Estate), Exhibit 4 (Promissory Note), Exhibit 5 (Deed of Trust), and Exhibit 6 (Agreed Receipt and Balance on Deed of Trust). The plaintiffs seek that all testimony regarding transactions or statements by and among Anthony Nunley, William Nunley, and Jewel Nunley be inadmissible pursuant to the Dead Man's Statute. The Plaintiffs also seek that all testimony and parol evidence regarding alleged agreements by William Nunley, Jewel Nunley, and Anthony Nunley be inadmissible pursuant to the Tennessee Statute of Frauds.

The Plaintiffs also moved for a motion for judgment on the pleadings. The judgment of the pleadings seeks a ruling that the tenancy is a tenancy at common based on the 2000 Warranty Deed and to dismiss the motion to reform the 2000 Warranty Deed to conform with the 2013 agreement between Jewel and Anthony.

Previously, the Court dismissed Diana Gorman without prejudice as a party on February 20, 2019. The Court further granted the Defendant's motion to continue hearing on a motion for judgment on the pleadings and motion in limine. The trial is scheduled for August 28, 2019.

Facts

On or around August 22, 2000, East Tennessee Chair Company, Inc. transferred and conveyed real property in Carter County, Tennessee to William Nunley, Jewel Nunley, and Anthony Nunley. The warranty deed, dated August 20, 2000, was recorded in the Register's office of Carter County, Tennessee. The deed states,

> THIS IDENTURE made and entered into on this the 22nd day of August, 2000, between EAST TENNESSEE CHAIR COMPANY, INC., party of the first part, and WILLIAM NUNLEY, JEWEL NUNLEY and ANTHONY NUNLEY, as tenants in common, parties of the second part.

William Nunley and Jewel Nunley pledged their personal residence as collateral to borrow the funds to purchase the property for $260,000. There is a dispute as to whether there was an agreement between Mr. and Mrs. Nunley and Anthony Nunley that Anthony Nunley would pay this debt and would then fully own the property.

William and Jewel Nunley were married at the time East Tennessee Chair Company conveyed the property and they remained married until William's death. William died intestate in or around 2007. He was survived by his wife, Jewel, and his children, Deborah Bartley, Delilah Nunley, Diana Gorman, and Anthony Nunley. Following William's death, Jewel and Anthony entered into a "Contract to Purchase Real Estate," on May 23, 2013. A copy of the contract is in the Register's office of Carter County, Tennessee. The contract consideration included Anthony making a payment of $116,000 more or less. On the same day, Jewel quitclaimed all her right, title, and interest in

the disputed property to Anthony. Following the purchase of the property, Anthony leased a portion of the property to Snap-On Tools.

Anthony died intestate on June 30, 2016. A probate administration was commenced before the Carter County Probate Court. Tiny Nunley is the surviving spouse of Anthony and is the Administratix of Anthony's estate.

Plaintiffs and Defendant dispute the ownership of the property and the type of tenancy created when Anthony and his parents jointly acquired the property. Plaintiffs contend the deed created a tenancy in common, giving William, Jewel, and Anthony each a one-third interest in the property.

Anthony, Deborah, Delilah, and Diana are the children of William and Jewel Nunley. They assert that at the death of their father, William, his one-third interest in the property was inherited by Jewel (1/3 of the one-third interest) and 2/3 of William's interest by his children: Anthony, Deborah, Delilah, and Diana. As a result of his death, Anthony, Deborah, Delilah, and Diana each inherited a 1/18th share in the disputed property.

In response, Defendant contends that the disputed deed created a tenancy by the entirety in a one-half interest held by William and Jewel as a married couple, with Anthony holding the other one-half interest. As a result, William's death vested his interest in surviving wife, Jewel, and she sold all of her interest to Anthony on May 23, 2013. Accordingly, Defendant maintains that at his death, Anthony owned the property in fee simple without a tenancy.

Conclusions of Law

It is essential that the complaint in a partition suit set out a correct legal description of the property, and its situation, the interest of each of the parties, and such other facts as may be necessary to show the various rights and equities of the parties and those interested in the distribution of the proceeds of any sale or who might be affected by a partition in kind. *See Gibson's Suits in Chancery*, Sec. 1106 (Fifth Ed. 1956). *Yates v. Yates*, 571 S.W.2d 293, 295 (Tenn. 1978).

Therefore, the Court must determine the interest of each of the parties, which the parties agree is controlled by the meaning of the language creating the original tenancy among William, Jewell, and Anthony.

1. *The 2000 Warranty Deed is Clear and Unambiguous*

The Court's initial task is to "determine whether the language in the contract is ambiguous." *Ray Bell Constr. Co. v. State*, 356 S.W.3d 384, 387 (Tenn. 2011) (citing *Planters Gin Co. v. Fed. Compress & Warehouse Co.*, 78 S.W.3d 885, 890 (Tenn. 2002)). A "clear and unambiguous contract is a question of law for the court and the court's role is to interpret the contract according to its plain terms." *Gulf Ins. Co. v. Construx, Inc.*, 2001 Tenn. App. LEXIS 540, at *26 (Ct. App. July 26, 2001) (citing *Hardeman County Bank v. Stallings*, 917 S.W.2d 695, 699 (Tenn. Ct. App. 1995)).

If the contract is clear and unambiguous, the parties' intent is determined by the four corners of the contract. *Ray Bell*, 356 S.W.3d at 387. To determine if the language is unclear and ambiguous, the court looks at the language of the contract in the context of the whole agreement. *Cocke County Bd. of Highway*

Commrs. v. Newport Utils. Bd., 690 S.W.2d 231, 237 (Tenn. 1985). If a contract can be susceptible to more than one interpretation, the agreement is ambiguous, and the court can turn to parol evidence to interpret the contract. *Memphis Housing Auth. v. Thompson*, 38 S.W.3d 504, 512 (Tenn. 2001). A contract is only ambiguous if it can be understood in more than one way. *Empress Health and Beauty Spa, Inc. v. Turner*, 503 S.W.2d 188 (Tenn. 1973).

A contract is not ambiguous solely because the parties interpret the contract differently. *Campora v. Ford*, 124 S.W. 3d 624 (Tenn. Ct. App. 2003). Further, parol evidence may be offered to remove any latent ambiguity. *Thomas v. Carmichael*, 850 S.W.2d 127, 132 (Tenn. 1992). A latent ambiguity exists when:

> The equivocality of expression, or obscurity of intention, does not arise from the words themselves, but from the ambiguous state of extrinsic circumstances to which the words of the instrument refer, and which is susceptible of explanation by the mere development of extraneous facts, without altering or adding to the written language, or requiring more to be understood thereby than will fairly comport with the ordinary or legal sense of the words and phrases made use of.

Mitchell v. Chance, 149 S.W.3d 40, 44 (Tenn. Ct. App. 2004).

In the present case, the language of the deed provides for an ownership as tenants in common. The deed states:

> THIS IDENTURE made and entered into on this the 22nd day of August, 2000, between EAST TENNESSEE CHAIR COMPANY, INC., party of the first part, and WILLIAM NUNLEY, JEWEL NUNLEY and ANTHONY NUNLEY, as tenants in common, parties of the second part.

The language leaves no ambiguity because it plainly states the tenancy. The language here uses explicit, clear language of tenants in common in the deed to establish ownership. The intent of the parties is evidenced by the language from the deed that states the names followed by the legal phrase "tenants in common."

It is true that the deed fails to explain that Jewel and William were married. The Defendant asserts the lack of words concerning marriage is evidence that the deed is latently ambiguous. As such, one could infer that the deed lacks clarity because there is no language to show the relationship of the parties or a clause to clarify the ownership. Nonetheless, the deed explicitly states that the tenancy is a tenants in common arrangement. Therefore, the language of the deed is clear and unambiguous.

Further, the language, here, does not leave any latent ambiguities because the language clearly states the intent of the parties. The deed uses the descriptive legal phrase, tenants in common, following the creation of the tenancy. *The 2000 Warranty Deed created a Tenancy in Common.*

A tenancy by the entirety is an ownership between a man and wife that at the time of death of one of the spouses, the interest of one spouse vests in the survivor and the laws of descent do not apply. *Grahl v. Davis*, 971 S.W.2d 373, 378 (Tenn. 1998). If the four unities of intent, title, time, and possession exist at the time of conveyance and the conveyance is to a married couple, and there is no language to indicate a contrary intent, the conveyance is a tenancy by the entirety. *Id.* at 681. "The creation of a tenancy by the entirety can be rebutted only when a contrary intention is expressed in the instrument itself, as opposed to extrinsic evidence." *Smith v. Sovran Bank Cent. S.*, 792 S.W.2d 928, 930 (Tenn. Ct. App. 1990) (citing *Myers v. Comer*, 144

Tenn. 475, 479 (1921)). The Court of Appeals stated, "a tenancy by the entirety arises only when the grantor or testator intends that it should. Husband and wife take as tenants in common or joint tenants if the conveyance so indicate." *Preston v. Smith*, 293 S.W.2d 51, 59 (1955) (quoting *Holt v. Holt*, 202 S.W.2d 650 (1947)). "Without any affirmative expression of how they are to take, there is a presumption that they take by the entirety." *Id.* A husband and wife can choose to own their property in any way they choose, whether they choose tenancy by the entirety, tenancy in common, or joint tenants. *First American National Bank v. Evans*, 417 S.W.2d 778, 780-81 (1967). A tenancy in common can be created by a conveyance to a husband and wife that shows the intent to create a tenancy in common, and no particular words are needed to show the intent. *Myers v. Comer*, 144 Tenn. 475, 479 (1921).

The deed was a tenancy among three persons, two of whom were married. Courts often construe common ownership as tenancy by the entirety when the two owners are married and no contrary intent is expressed in the deed. While the definition of marriage has evolved over time, it has not been extended to encompass three or more individuals. The deed is only subject to construction as an instrument that creates a tenancy in common, because the law has yet to construe a tenancy of the entireties from a joint tenancy in situations of ownership beyond two persons who are spouses. Here, there are three owners and the marital relation of each of the three is without significance to construing the tenancy created by the wording of the deed.

Here, the deed uses the phrase "tenants in common" following the names of the parties who are in tenancy. Here, the plaintiffs argue the language is clear because it shows the tenancy and the parties in ownership, while the defendant argues that the tenancy was intended to be a tenancy by the entireties because

William and Jewel were married when the tenancy was created and Anthony was going to take ownership. The instrument is assumed to be a tenancy in the entirety unless the instrument provides an intent to create a tenants in common. Comparable to *Myers*, the deed contains language that explicitly describes a tenancy in common. *Id.* at 481. The language, here, shows intent to describe a tenancy in common because the deed has language that uses the terms, tenants in common. Therefore, the 2000 Warranty Deed created a tenancy in common.

2. *The statements by and among Anthony Nunley, William Nuley, and Jewel Nunley are Barred under the Dead Man's Statute*

The Tennessee Dead Man's Statute states as follows:

> In actions or proceedings by or against executors, administrators, or guardians, in which judgments may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate, or ward, unless called to testify thereto by the opposite party.

TENN. CODE ANN. § 24-1-203.

The Dead Man's Statute prevents parties from giving self-interested and self-serving testimony about interactions and transactions with the deceased regarding testimony that would either increase or decrease the deceased estate. *Cantrell v. Estate of Cantrell*, 19 S.W.3d 842, 846 (Tenn. Ct. App. 1999). The Dead Man's Statute "contemplates those cases wherein judgment may be rendered for the representative party and against the proposed witness, or vice versa. It does not comprehend a case wherein no judgment could be rendered for or against the one called upon to testify, even though a judgment might be rendered for or against the personal representative."

Bernard v. Reaves, 178 S.W.2d 224 (Tenn. Ct. App.1943). Courts have interpreted the Dead Man's Statute as against the exclusion of testimony and in favor of admission. *Haynes v. Cumberland Builders, Inc.*, 546 S.W.2d 228, 231 (Tenn. Ct. App. 1976). In order to reject testimony under the statue, "(1) the proposed witness must be a party to the suit in such a way that judgment may be rendered for or against him; and (2) the subject matter of his or her testimony must concern some transaction with or statement by the testator or intestate." *Malek v. Gunter*, 2009 Tenn. App. LEXIS 851, at *12-13 (Ct. App. Dec. 16, 2009) (citing *Montague v. Thomason*, 18 S.W. 264 (Tenn. 1892)). The Court of Appeals stated the Dead Man's Statute "does not contemplate a proceeding, the result of which can neither increase nor diminish the assets of the estate but concerns only the manner in which the assets will be distributed." *Baker v. Baker*, 142 S.W.2d 737, 744 (1940).

Here, Tennessee's Dead Man Statute allows evidence and testimony to be excluded when the person is a party, a judgment can be made for or against them, and the testimony concerns the transaction of the testator or intestate. Plaintiffs seek to bar all testimony regarding the transactions between William, Anthony, and Jewel. The Defendant states that the deed, the purchase contract, the deed of trust, and the promissory note are not barred under the Dead Man's Statute because it will not increase or deplete the estate. If the documents and testimony are allowed, the purported purpose will be to increase the estate's assets; therefore, the statements by and among Anthony Nuley, William Nunley, and Jewel Nunley are barred under the Dead Man's Statute.

3. *Under the Statute of Frauds, the agreements and undertakings, other than 2000 Warranty Deed, are not admissible.*

According to Tennessee's Statute of Frauds,

> no action shall be brought... [u]pon any contract for the sale of lands, tenements, or hereditaments, or the making of any lease thereof for a longer term than one (1) year .... unless the promise or agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person lawfully authorized by such party. In a contract for the sale of lands, tenements, or hereditaments, the party to be charged is the party against whom enforcement of the contract is sought.

TENN. CODE ANN. § 29-2-101(a)(4).

In Tennessee, the courts strictly enforce the Statute of Frauds as to real property, and it is considered an affirmative defense. *Cellco P'ship v. Shelby Cnty.*, 172 S.W.3d 574, 593 (Tenn. Ct. App. 2005). No action should be brought on sales of property, "unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized." *Patterson v. Davis*, 192 S.W.2d 227, 229 (1945). When looking at testimony,

> The statute of frauds does not exclude parol evidence; it simply makes certain agreements unenforceable through suit unless they are evidenced by a signed memorandum. The parol evidence rule protects a completely integrated

> written contract from being varied or contradicted by extraneous evidence but does not require any particular type of agreement to be in writing.

GRW Enters., Inc. v. Davis, 797 S.W.2d 606, 612 (Tenn. Ct. App. 1990).

Tennessee courts require a description of the land in writing to satisfy the statute of frauds by asserting,

> a description of land is good within the statute of frauds which on its face appears to refer to some definite tract, and which by the aid of parol proof can with reasonable certainty be applied to designate such tract ... If the description is on its face so indefinite as to be applicable to any tract of land, then parol evidence is not admissible at all "because its effect is to supply by parol a material part of the agreement, which the statute of frauds requires to be . . . in writing." *Case v. Brier Hill Collieries*, 235 S.W. 57, 59 (1921) (quoting *Dobson v. Litton*, 45 Tenn. 616 (1868).

Here, the written 2000 Warranty Deed is clear and unambiguous, and parol evidence, whether written or oral, is not permitted to contradict the deed. The Plaintiffs seek that all testimony and parol evidence should be barred under the Statute of Frauds. The 2000 Warranty is in writing and describes the parties, property, and tenancy. The 2000 Warranty Deed is available, and the deed is not ambiguous as it describes, the parties, the tenancy, and the transaction; thus, the written instrument is clear and the Statute of Frauds bars any evidence and testimony of the transaction of real estate.

4. The 2000 Warranty Deed is not Subject to Reformation in Light of the 2013 Purchase Contract.

In Tennessee, "[r]eformation is an equitable process by which the court corrects a mistake in writing so that it fully and accurately reflects the agreement of the parties." 22 TENN. JUR. RESCISSION, CANCELLATION AND REFORMATION § 46 (1999). To reform a writing on mistake, "there must have been either a mutual mistake or a unilateral mistake induced by fraud." *Lane v. Spriggs*, 71 S.W.3d 286, 289 (Tenn. Ct. App. 2001) (quoting *Williams v. Botts*, 3 S.W.3d 508, 509 (Tenn. Ct. App. 1999)). When looking at reform, "[a] 'mistake' is an act which would have been done, or an omission which would not have occurred, but from ignorance, forgetfulness, inadvertence, mental incompetence, surprise, misplaced confidence, or imposition." *Id.* at 509-10. For reformation to be appropriate, the mistake or fraud must be proven by clear, cogent, and convincing evidence. *Id.* Reformation can be a remedy "to parties and the privies of parties to written instruments, to rectify them where they fail, through mistake or fraud, to conform with the real agreement." *Henderson v. Henderson*, 14 S.W.2d 714, 715 (1928). The chancellor "has the power to reform and correct errors in deeds produced by fraud or mistake." 22 TENN. JUR. RESCISSION, CANCELLATION AND REFORMATION § 46 (1999).

Here, Defendant seeks to reform the 2000 warranty deed to reflect the alleged original intent of Willian, Jewel and Anthony that either survivor spouse would have a one-half interest in the property that could be sold to Anthony as reflected by the assertion that Anthony acquired full title with the 2013 Contract to Purchase. This is a request of the Court that requires the Court to rewrite the 2000 deed, not merely reform it. If the Court attempted to reform the 2000 Warranty Deed, the change will likely reflect the intention of two parties, Jewel and Anthony, at

the time of the purchase contract in 2013. However, the reform will not represent all parties' interest. The 2013 Contract was made after the death of William, years after the original deed. Therefore, the interests and agreement between all three parties is likely not reflected in the 2013 Contract. Furthermore, the Court will lack testimony of two of the three parties who obtained ownership. In conclusion, the Court will not reform the deed because the Defendant will not be able to show a mistake with clear evidence as two parties are deceased and the contract only concerns two of the parties years after the original deed.

Based on the foregoing, it is therefore Ordered, Adjudged, and Decreed by the Court:

1. Plaintiff's motion to bar evidence is granted under the parol evidence rule and the Statute of Frauds.

2. Plaintiff's motion for judgment on the pleadings is granted, and the Court declares the 2000 warranty deed created a tenants in common, and that Anthony Nunley owned a 5/6th share at the time of his death, and that Deborah D. Bartley, Delilah J. Nunley, and Diana Gorman each own an undivided 1/18th interest in the real property described in the 2000 warranty deed.

3. The Defendant's counter-complaint to reform the deed is dismissed.

4. Clerk and Master, enter this Order, and mail a copy to the attorneys of record.

So Ordered, this 17th day of July 2019.

John C. Rambo

Chancellor John C. Rambo

I, Melissa Marchand, Clerk and Master of the Chancery Court, Elizabethton, Tennessee, hereby certify that this is a true and perfect copy of the original Order filed in this cause.

This July 17, 2019

Melissa Marchand

Clerk and Master MC

CERTIFICATE OF SERVICE

I, Melissa Moreland, Clerk and Master for the Chancery Court of Carter County, Tennessee, do hereby certify that a copy of the Order was served upon the parties by depositing in regular mail as follows:

Atty Brett Cole
206 Princeton Road, Ste 32
Johnson City, TN 37601

Atty Mark Dessauer
1212 North Eastman Road
P. O. Box 3740
Kingsport, TN 37664

This the 11th day of September, 2019

Melissa Moreland
MELISSA MORELAND
CLERK AND MASTER

TG

IN THE CHANCERY COURT
FOR THE SECOND JUDICIAL DISTRICT
AT BRISTOL, TENNESSEE

SULLIVAN COUNTY, TENNESSEE AND THE SULLIVAN COUNTY BOARD OF EDUCATION, Plaintiffs, V. THE CITIES OF KINGSPORT AND BRISTOL, TENNESSEE, MUNICIPALITIES OF THE STATE OF TENNESSEE, Defendants.	Civil Action No. B0024737 *NOTICE OF ENTRY

FINAL ORDER

On December 23, 2015, the Court heard oral arguments on pending motions for summary judgment filed by Plaintiffs and Defendants. Upon the conclusion of the hearing, the Court reserved judgment pending the issuance of a written opinion.

I. **Procedural History**

On May 30, 2014, Plaintiffs, Sullivan County, Tennessee, and the Sullivan County Board of Education filed suit against Defendant City of Bristol, Tennessee. On this same day, Plaintiffs filed a similar lawsuit against the City of Kingsport, Tennessee. The Clerk and Master assigned case number K0039409(C) to the Kingsport case. Both cases were consolidated by order filed August 10, 2015. Finally on September 29, 2015, the Honorable

James F. Goodwin, Jr., Presiding Judge of the Second Judicial District, designated this judge to hear the consolidated suits.

Plaintiffs sued Defendants on the basis that Plaintiffs are not receiving their allotted share of tax revenue designated for education that is generated by liquor-by-the-drink sales in the two respective municipalities. (Pls.' Compl. v. Bristol ¶¶ 7, 8, 12 and Pls.' Compl. v. Kingsport ¶¶ 7, 8, 12.) Plaintiffs assert both Defendants are legally obligated to pay money to Sullivan County as its portion of liquor-by-the-drink tax revenue wrongfully withheld by the Cities. (Pls.' Compl. v. Bristol ¶ 17 and Pls.' Compl. v. Kingsport ¶ 17.) Plaintiffs seek approximately $1,340,037, plus interest, from the City of Kingsport for tax revenues generated between 1980-2013. (Pls.' Compl. v. Kingsport ¶ 18.) Plaintiffs assert the City of Bristol owes Sullivan County approximately $758,239 for the same time period, plus interest. (Pls.' Compl. v. Bristol ¶ 18.)

II. Issue

The issue before this Court is whether Tennessee Code Annotated section 57-4-306 compels a municipality that has adopted "liquor-by-the-drink" to remit taxes from the sale of liquor-by-the-drink to the local county, where the county itself has failed to opt into the provisions of Tennessee Code Annotated sections 57-4-301 and 57-4-306. These sections allow a "local political subdivision" to sell and tax liquor-by-the-drink. Determinative of this issue is whether the phrase, "expended and distributed in the same manner as the county property tax for schools is expended and distributed," found at Tennessee Code Annotated section 57-4-306(a)(2)(A). This Court must decide if this phrase is intended to mean that a municipality, which has locally adopted liquor-by-the-drink sales, must expend and distribute twenty-five percent of the liquor-by-the-drink tax collected within the cities to both cities and the county

for educational use according to the average daily attendance formula. This familiar formula requires a county government to allocate school funding among county and municipal school systems within the county based on student population figures. The County argues the provision I question compels a municipality to share this tax with the county school system and, by implication, other local school systems within the county in the same manner that a county is required to follow. In opposition, the Cities argue this provisions means the commissioner of revenue distributes to the appropriate political entity, whether municipality or county, funds for educational use, which are then expended according to a school budget.

III. Procedural Posture and Facts

The cities of Bristol and Kingsport (collectively "Cities") both passed liquor-by-the-drink referendums. Bristol passed its referendum in May of 1984. (Defs.' Statement of Undisputed Material Facts ¶ 3.) Kingsport passed its referendum in November of 1984. (*Id.* at ¶ 2.) Sullivan County ("County") has not held a liquor-by-the-drink referendum. (*Id.* at ¶ 1.) Sullivan County initiated this litigation with the filing of its complaints on May 30, 2014, claiming that Bristol and Kingsport were not distributing the 25% of the funds from the liquor-by-the-drink tax in the same manner as the county property tax was expended and distributed. (Pl.'s Compl. ¶ 15.) Further, Plaintiffs allege Bristol had an obligation under section 57-4-306 to remit some of its taxes back to the County and has failed to do so. (*Id.* at ¶¶ 16-17.) Kingsport was also added as a defendant and the case was consolidated on August 10, 2015. (*See* Order of Consolidation (2015)). On September 17, 2015, the Cities filed their Motion for Summary Judgment. Soon after, Sullivan County filed their Motion for Summary Judgment. On September 29, 2015, the case was assigned by the presiding judge of the

Second Judicial District to this judge. Oral arguments were heard on December 23, 2015, and this Court took the Summary Judgment Motions under advisement.

IV. Summary Judgment Standard

For actions initiated on or after July 1, 2011, such as the one at bar, the standard of review for summary judgment delineated in Tennessee Code Annotated section 20-16-101 (Supp. 2015) applies. *See Rye v. Women's Care Center of Memphis, MPLLC*, __ S.W.3d __, 2015 Tenn. LEXIS 906, at *32 (Tenn. Oct. 26, 2015). The statute provides:

> In motions for summary judgment in any civil action in Tennessee, the moving party who does not bear the burden of proof at trial shall prevail on its motion for summary judgment if it:
>
> (1) Submits affirmative evidence that negates an essential element of the nonmoving party's claim; or
>
> (2) Demonstrates to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim.

TENN. CODE ANN. § 20-16-101. The grant or denial of a motion for summary judgment is a matter of law. *See Dick Broad. Co., Inc. of Tenn. v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 671 (Tenn. 2013) (citing *Kinsler v. Berkline, LLC*, 320 S.W.3d 796, 799 (Tenn. 2010)). "Summary judgment is appropriate when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Rye*, __ S.W.3d at __, 2015 Tenn. LEXIS 906, at *35 (quoting TENN. R. CIV. P. 56.04). Pursuant to Tennessee Rule of Civil Procedure 56.04, a trial court must "state the legal grounds upon which the court denies or grants the motion" for summary judgment, and our Supreme Court has instructed that the trial court must state these grounds "before it invites or requests the prevailing party to draft a proposed order." *See Smith v. UHS of Lakeside, Inc.*, 439 S.W.3d

303, 316 (Tenn. 2014).

Concerning the requirements for a movant to prevail on a motion for summary judgment pursuant to Tennessee Rule of Civil Procedure 56, our Supreme Court has explained in pertinent part:

> We reiterate that a moving party seeking summary judgment by attacking the nonmoving party's evidence must do more than make a conclusory assertion that summary judgment is appropriate on this basis. Rather, Tennessee Rule 56.03 requires the moving party to support its motion with "a separate concise statement of material facts as to which the moving party contends there is no genuine issue for trial." Tenn. R. Civ. P. 56.03. "Each fact is to be set forth in a separate, numbered paragraph and supported by a specific citation to the record." *Id.* When such a motion is made, any party opposing summary judgment must file a response to each fact set forth by the movant in the manner provided in Tennessee Rule 56.03. "[W]hen a motion for summary judgment is made [and] . . . supported as provided in [Tennessee Rule 56]," to survive summary judgment, the nonmoving party "may not rest upon the mere allegations or denials of [its] pleading," but must respond, and by affidavits or one of the other means provided in Tennessee Rule 56, "set forth specific facts" *at the summary judgment stage* "showing that there is a genuine issue for trial." Tenn. R. Civ. P. 56.06. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co.*, 475 U.S. at 586, 106 S. Ct. 1348. The nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party. If a summary judgment motion is filed before adequate time for discovery has been provided, the nonmoving party may seek a continuance to engage in additional discovery as provided in Tennessee Rule 56.07. However, after adequate time for discovery has been provided, summary judgment should be granted if the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the existence of a genuine issue of material fact for trial. Tenn. R. Civ. P. 56.04, 56.06. The focus is on the evidence the nonmoving party comes forward with at the summary judgment stage, not on hypothetical evidence that theoretically could be adduced, despite the passage of discovery deadlines, at a future trial.

Rye, 2015 Tenn. LEXIS 906, at *74-75 (emphasis in original). This Court must view all of the evidence in the light most favorable to the nonmoving party and resolve all factual inferences in the nonmoving party's favor. *Martin v. Norfolk S. Ry. Co.*, 271 S.W.3d 76, 84 (Tenn. 2008); Luther v. Compton, 5 S.W.3d 635, 639 (Tenn. 1999); *Muhlheim v. Knox Cnty. Bd of Educ.*, 2

S.W.3d 927, 929 (Tenn. 1999). If the undisputed facts support only one conclusion, then the moving party is entitled to judgment as a matter of law. *See White v. Lawrence*, 975 S.W.2d 525, 529 (Tenn. 1998); *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995).

V. Analysis

a. Tennessee Code Annotated Section 57-4-306

The predecessor of Tennessee Code Annotated section 57-4-306 was Tennessee Code Annotated section 57-162. Tennessee Code Annotated section 57-162 was the codification of provisions enacted pursuant to Public Acts 1967, Chapter Number 211 ("Public Acts" or "Acts") adopted in 1967 as part of a continuous dissolution of remnants of prohibition of alcohol in the state of Tennessee. The Preamble of the Public Acts declared that the "principle of freedom of choice of the people as to whether alcoholic beverages shall be sold for consumption on the premises is a fundamental foundation of a democratic society." The Public Act, then codified in Title 57, Chapter 1 of Tennessee Code Annotated, gave the choice to counties, whose population was larger than 235,000 according to the 1960 federal decennial census, to conduct a referendum for alcoholic beverage sales for on premises consumption. *See* TENN. CODE ANN. § 57-164 (1968). Tennessee Code Annotated section 57-162 governed the distributions of tax collections from the fifteen percent tax on gross sales of alcoholic beverages of liquor-by-the-drink consumed on premises. It provided that:

> All gross receipt taxes collected under subdivision (b) of § 57-157 herein shall be distributed by the commissioner of revenue as follows:
>
> (a) Fifty percent (50%) to the general fund to be earmarked for education purposes; and (b) Fifty percent (50%) to the local political subdivision.
>
> (1) One half (1/2) of the proceeds shall be expended and distributed in the same manner as the county property taxes for schools is expended and distributed.

(2) The other one half (1/2) shall be distributed as follows:

(a) Collections of gross receipts collected in unincorporated areas to the county general fund.

(b) Collections of gross receipts in incorporated cities, towns, to the city or town wherein said tax is collected.

Tennessee Code Annotated sections 57-111 and 57-162 went through many revisions and amendments including allowing any municipality, regardless of its size, to conduct a referendum to authorize the sale of liquor-by-the-drink.

b. **Statutory Construction**

As always, the construction of a statute is a question of law. *In re Estate of Tanner*, 295 S.W.3d 610, 613 (Tenn. 2009). The Supreme Court in *Lee Med., Inc. v. Beecher* expounded comprehensively on the different principles and rules of statutory construction. When this Court is "called upon to construe a statute, [this Court's] goal is to give full effect to the General Assembly's purpose, stopping just short of exceeding its intended scope." *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 526 (Tenn. 2010) (citations omitted). "Because the legislative purpose is reflected in a statute's language, [this Court] must always begin with the words that the General Assembly has chosen." *Id.* (citations omitted). In interpreting the words of the statute, this Court "must give these words their natural and ordinary meaning." *Id.* (citations omitted). Further, because "these words are known by the company they keep, [this Court] must also construe these words in the context in which they appear in the statute and in light of the statute's general purpose." *Id.* at 526-27 (citations omitted).

"When a statute's text is clear and unambiguous, [this Court] need[s] not look beyond the statute itself to ascertain its meaning." *Id.* at 527 (citations omitted). However,

"[s]tatutes . . . are not always clear and unambiguous. Accordingly, when [this Court] encounter[s] ambiguous statutory text—language that can reasonably have more than one meaning—[this Court] must resort to the rules of statutory construction and other external sources to ascertain the General Assembly's intent and purpose." *Id.* (citations omitted).

This Court may apply certain presumptions when construing a statute. These presumptions include "the General Assembly used every word deliberately and that each word has a specific meaning and purpose." *Id.* (citations omitted). Further, this Court may presume "the General Assembly did not intend to enact a useless statute" or "intend an absurdity." *Id.* (citations omitted) (internal quotes omitted).

This Court also may attribute certain presumptions regarding the General Assembly's "knowledge of the existing law affecting the subject matter of the legislation" including that "the General Assembly knows the 'state of the law.'" *Id.* (citation omitted). "In addition, [this Court] may presume that the General Assembly is aware of its own prior enactments" and "the manner in which the courts have construed the statutes it has enacted." *Id.* (citations omitted).

If a statute is ambiguous, this Court may refer to external sources in resolving the statute. This Court "may consider, among other things, public policy, historical facts preceding or contemporaneous with the enactment of the statute being construed, and the background and purpose of the statute." *Id.* at 528 (footnotes omitted). Courts "may also consider earlier versions of the statute, the caption of the act, the legislative history of the statute, and the entire statutory scheme in which the statute appears." *Id.* (footnotes omitted). The Supreme Court cautions that "no matter how illuminating these non-codified external sources may be, they cannot provide a basis for departing from clear codified

statutory provisions." *Id.* (citation omitted). This Court must keep in mind at all times that "[t]he cardinal rule of statutory construction is to effectuate legislative intent, with all rules of construction being aides to that end." *Chattanooga-Hamilton Cty. Hosp. Auth. v. Bradley Cty.*, 249 S.W.3d 361, 366 (Tenn. 2008) (citation omitted).

c. Tennessee Code Annotated section 57-4-306 is not Ambiguous

Both parties submitted well-thought-out and well-argued Motions for Summary Judgment. Each Motion for Summary Judgment may be boiled down to an essential argument. Sullivan County argues the statute is unambiguous. (Pls.' Brief in Support of Mot. for Summary Judgment p. 4). The County asserts that since the phraseology "expended and distributed in the same manner as the county property tax for schools is expended and distributed" mirrors the language of Tennessee Code Annotated section 67-6-712, the Cities are required to distribute the funds according to the average daily attendance as the counties must distribute and expend funds.[1] *Id.* at p. 18. It is settled law that the provision of Tennessee Code Annotated section 67-6-712(a)(1) that "expended and distributed in the same manner as the county property tax for school purposes is expended and distributed. . ." requires a county receiving local option sales tax money to place those funds in the county's school fund, which is then distributed to county and municipal school systems according to student population.

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[1] The Local Option Revenue Act ("LORA") states in the pertinent part: "(a) The tax levied by a county under this part shall be distributed as follows:

> (1) One-half (1/2) of the proceeds shall be expended and distributed in the same manner as the county property tax for school purposes is expended and distributed; and
> (2) The other one-half (1/2) as follows:
> (A) Collections for privileges exercised in unincorporated areas, to such fund or funds of the county as the governing body of the county shall direct;
> (B) Collections for privileges exercised in incorporated cities and towns, to the city or town in which the privilege is exercised;
> (C) However, a county and city or town may by contract provide for other distribution of the one-half (1/2) not allocated to school purposes."

TENN. CODE ANN. § 67-6-712.

Tennessee Code Annotated section 49-3-315(A) states in relevant part:

> **Local tax levy --Special transportation tax levy and fund.**--(a) For each LEA there shall be levied for current operation and maintenance not more than one school tax for all such grades as may be included in the LEA. Each LEA shall place in one (1) separate school fund all school revenues for current school operation purposes received from the state, county and other political subdivisions, if any . . . . All school funds for current operation and maintenance purposes collected by any county, except the funds raised by any local special student transportation tax levy as authorized in this subsection, shall be apportioned by the county trustee among the LEAs therein on the basis of the WFTEADA maintained by each, during the current school year.

Under this statute, the property taxes assessed for education must be apportioned between the county and local municipal school districts. In *City of Harriman v. Roane County*, 553 S.W.2d 904, 908 (Tenn. 1977) the Supreme Court stated regarding local option sales tax collected by counties:

> Under T.C.A. § 67-3052(1) [now § 67-6-712] the county is directed to expend one-half of its sales tax proceeds for school purposes, and under T.C.A. § 49-605 [now § 49-3-315] these are to be divided with the city school system on an average daily attendance basis.

The average daily attendance requires taxes to be distributed to municipalities and counties that both run separate school systems according to the average daily attendance of the respective municipal and county schools. According to the County's interpretation, each City is required to further distribute liquor-by-the-drink tax revenue to the County. Since the Cities have not distributed these funds to the County, the County asserts the Cities now owe funds to the County for undistributed funds dating from 1984, when the Cities first passed liquor-by-the-drink referendums.

This Court agrees with the County that the statute is unambiguous. However, this Court's agreement with the County ends there. The Court disagrees with the County's use of § 67-6-712 to interpret § 57-4-306. As a technical matter, if a statute is unambiguous, courts

in Tennessee are not allowed to use the statutory scheme to interpret an unambiguous statute. *See Lee Med.*, 312 S.W.3d 515 at 527. Second, the County's interpretation requires a two-part distribution scheme. Specifically, the Commissioner of Revenue would have to distribute the disputed funds to the municipalities, and then the municipalities would have to further distribute the funds according to the average daily attendance formula.

The plain language of section 57-4-306 states that the funds "*shall* be distributed by the commissioner as follows." (emphasis added). Under subsection (a)(1), the commissioner distributes fifty percent of the fifteen percent liquor-by-the-drink tax collected to Tennessee's general fund "earmarked for education purposes." TENN. CODE ANN. § 57-4-306(a)(1). Followed by subsection (a)(1) of section 57-4-306 is the conjunction "and." Under the subsequent subsection (a)(2) of section 57-4-306, the commissioner distributes the other fifty percent to the local political subdivision in two parts: one-half of the balance (twenty-five percent of the total collected) for the funding of schools; and one-half (twenty-five percent of the total collected) for either the county general funds, if collected in an unincorporated town or to the "city or town wherein such tax is collected." TENN. CODE ANN. § 57-4-306(a)(2)(A)-(B). Nowhere does the language require the municipalities to distribute the funds according to the average daily attendance. The plain language only requires the Commissioner of Revenue to distribute the gross receipt taxes from the sale of liquor-by-the-drink tax funds.

1. **The Cities are not required to Make a further distribution in like manner as Tennessee Code Annotated section 67-6-712**

The County asserts these funds flowing to the Cities under subpart (a)(2)(A) of section 57-4-306 must be further distributed in accordance with the manner of distribution found at

Tennessee Code Annotated section 67-6-712. However, section 67-6-712 only places an obligation upon all counties to distribute funds from taxes it levies for education to all county and municipal school systems, but it places no such imposition upon the municipalities. Tennessee Code Annotated section 67-6-712 directs that a county need expend only one-half of the retail sales tax proceeds for school purposes, dividing such proceeds with any municipal school system on an average daily attendance basis pursuant to section 49-3-315. Our Supreme Court has distinguished between municipalities and counties regarding the sharing of the balance of certain local option taxes that are not restricted to educational purposes. The Court has found that where the county governing body chooses to apply the remaining one-half of the retail sales tax proceed to school purposes, these proceeds must also be shared with the city school systems pursuant to section 49-3-315. *Harriman v. Roane County*, 553 S.W.2d 904, 908 (Tenn. 1977). The 1963 Local Option Revenue Act imposes no similar requirement upon the municipalities of Tennessee; the municipalities may expend their one-half of local option sales tax proceeds for their municipal school purposes without having to distribute the funds to the average daily attendance scheme, which would trigger sharing with the county and any other municipal school system within the county. Likewise, any additional local option sales tax levied above the local option sales tax rate levied by the county represents an exclusive local source tax source of the municipality subject to expenditure by the municipality with no sharing requirement.

2. **The General Assembly elected not to require the Cities to make a further distribution**

Under the exception of Tennessee Code Annotated section 57-4-306(a)(2)(A), funds that have been "expended and distributed to municipalities which do not operate their own

school systems" must remit this twenty-five percent portion to the local county. This section provides two elucidations to the interpretation of section 57-4-306.

First, the General Assembly could plainly stated in the first part of subsection (A) of section 57-4-306(a)(2) that municipalities must distribute the funds. The General Assembly did not. This is the only mention of a local political subdivision distributing the funds that have been distributed to it by the commissioner. If the phrase "proceeds shall be expended and distributed in the same manner as the county property tax for schools is expended and distributed . . ." required municipalities to make a further distribution, then any municipality which elected to not operate its own school system would have remitted all of its portion distributed to it for school purposes to the county school fund since all public education within the municipality occurs within the county school system or systems operating within the municipality. However, the General Assembly founds this language insufficient to require this further distribution, and it adopted specific changes to the wording of section 57-4-306(a)(2)(A) to require the remittance of funds "expended and distributed" to the municipalities by the commissioner of revenue to the county school fund if the municipality does not operate a separate school system from the county.

There was a purpose in adding the specific requirement in subsection (A) of section 47-4-306(a)(2), which is that "municipalities which do not operate their own school systems separate from the county are required to remit one half (1/2) of their proceeds of the gross receipts liquor-by-the-drink tax to the county school fund . . .." The General Assembly undertook to add this additional requirement for the remittance from a municipality to the county school fund, because the previous clause providing that "proceeds shall be expended and distributed in the same manner as the county property tax for schools is expended and

distributed . . ." imposed no requirement upon a municipality operating its own school system to share any of its funds received for school purposes with the county school fund.

Second, if the General Assembly wanted one-half of the share of liquor-by-the-drink taxes shared by according to the average daily attendance basis pursuant to section 49-3-315, the General Assembly could have simply worded section 57-4-306(a)(2) to require commissioner of revenue to distribute the funds for local education directly to the county school fund in a similar fashion as required by Tennessee Code Annotated section 67-6-712(a)(1). The General Assembly did not. Further, implementing a requirement for the commissioner of revenue to make direct remittance of liquor-by-the-drink tax revenue to the county school fund instead of the municipality is not a new or unknown administrative process for state government as section 67-6-712 already imposes a requirement for local option sales tax funds to be remitted to the county school fund based on the situs of the transaction.

Perhaps the County could make a more compelling argument that the commissioner is required to distribute twenty-five percent of the funds referenced at subsection (a)(2)(A) of section 57-4-306 in accordance with the average daily attendance scheme. The County has not sued the commissioner, and the commissioner is not a party. However, even if the commissioner was a party, the plain language would not support this interpretation. If the commissioner distributed the funds according to the average daily attendance scheme, the provision that requires the municipality to remit twenty-five percent of the funds back to the county when the municipality does not operate a separate school system would represent surplus language at best and make no sense regardless. The inclusion of the exception language at Tennessee Code Annotated section 57-4-306(a)(2)(A) contemplated a municipality retaining the full twenty-five percent of the funds designated for municipal school system

purposes and not merely a municipality's portion of the funds that would have been distributed to it according to the average daily attendance scheme.

Finally, if the County's interpretation of section 57-4-306 was correct, the County could not recoup all the funds it claims. Any funds received by the County would go to the county school fund; and then would have to be distributed according to the same average daily attendance formula. This would require a third distribution scheme. This Court does not believe the General Assembly intended an absurd result of multiple distributions and increasing uneconomical transactional costs. Nor is this Court persuaded by the plain language of section 57-4-306 that anything more than one distribution scheme is required, and that is by the commissioner.

Interpreting the phrase "expended and distributed" in the whole context of section 57-4-306, the phrase means that funds will be distributed to the governmental entity in charge of educational funding and expended in accordance with an educational budget. In other words, the phrase "expended and distributed" is that phrase utilized by the General Assembly to require that a particular fund is earmarked by the local government for the use of funding schools. Further, the interpretation of "expended and distributed" as a way to earmark funds for the exclusive and restricted purpose of funding schools within the municipality receiving the money is the only way to give meaning to the exception found at section 57-4-306(a)(2)(A).

d. The County is not a local political subdivision that receives a direct distribution of liquor-by-the-drink tax revenue

Next, the funding is distributed to the commissioner to a local political subdivision. The meaning of "local political subdivision" is not limited to a county. Subsection (a)(2)(A) of

section 57-4-306 explicitly mentions both counties and municipalities. Further in section 57-4-306(a)(2)(B) counties, cities, and towns are mentioned. If local political subdivision only meant county, then parts of (a)(2)(A) and (B) of section 57-4-306 would be rendered meaningless. This Court is tasked with giving each word its full effect when construing a statute. *See Lee Med.*, 312 S.W.3d 515 at 526. The term "local political subdivision" refers to each political subdivision of the state of Tennessee that has successfully undertaken the referendum to authorize the sale of liquor-by-the-drink.

The Cities are of the belief that since the County has not passed a referendum according to section 57-4-103[2], the County cannot retain any of the benefits of the tax. (Defs.' Memorandum of Law and Fact Supporting Mot. for Summary Judgment p. 10). The Cities rely on the Attorney General's opinions and a Bradley County Chancery Court ruling that have reached the same conclusion.

The Cities interpret Tennessee Code Annotated section 57-4-103(a)(1) to mean the failure of a county to pass liquor-by-the-drink referendum resulted in the county failing to come under the provisions of § 57-4-306 and was not applicable to the County: i.e. that section 57-4-306 was only effective if a local political subdivision had passed a referendum. The language is clear from section 57-4-103(a)(1), that Chapter 4 of Title 57 does not apply to local government that fails to adopt liquor-by-the-drink. This means Sullivan County is not a "local political subdivision" for purposes of receiving "[f]ifty percent (50%) to the local political subdivision" at Tennessee Code Annotated section 57-4-306(a)(2). However, this does not necessarily mean the General Assembly did not intend that a county school fund would not

[2] The pertinent part of § 57-4-103 states: "(a)(1) This chapter shall be effective any jurisdiction which authorizes the sale of alcoholic beverages for consumption on the premise in a referendum in the manner prescribed by § 57-3-106."

receive a share of those funds distributed to the Cities pursuant to subpart (a)(2)(A) of section 57-4-103. The failure of Sullivan County to come under the provisions of Chapter 4 of Title 57 does not prevent the General Assembly's ability to direct liquor-by-the-drink tax revenue to a county school fund regardless of the legality of liquor-by-the-drink sales within a county.

The General Assembly may do with this liquor-by-the-drink tax revenue whatever it pleases. The portion of liquor-by-the drink revenues devoted to schools is so designated only because the General Assembly's prior determination. By not opting to adopt liquor-by-the drink by referendum, Chapter 4 of Title 57 is not applicable because of Tennessee Code Annotated section 57-4-103(a)(1), and thus the provisions of Chapter 4 that allow for consumption of liquor-by-the drink, licensing and regulating the consumption, and the collection of the state tax on liquor-by-the drink sales is not authorized within the unincorporated portions of the County.

While this Court agrees that Sullivan County is not a local political subdivision for receiving a direct fifty percent allocation of liquor-by-the-drink tax revenue because Sullivan County has not authorized its sale through the referendum and process at Tennessee Code Annotated section 57-4-103(a)(1), this Court finds that Sullivan County is not precluded by section 57-4-103(a)(1) from receiving liquor-by-the-drink tax revenue.

Tennessee Code Annotated section 57-4-103(a)(1) means the sale of liquor-by-the-drink, the regulations associated with it, and the taxes imposed on this economic activity, will not occur within a local subdivision of government that fails to adopt a liquor-by-the-referendum. Section 57-4-103 only dictates which municipality or county is generally under the authority and regulations of chapter 4 of Title 57. Section 57-4-103 imposes no direct limitation upon which local government may receive a distribution of liquor-by-the-drink

taxes; rather, section 57-4-103 means the sale and collection of tax revenue will not incur within a local government that has failed to adopt liquor-by-the-drink by referendum within the local political subdivision. Tennessee Code Annotated section 57-4-306 specifically dictates how liquor-by-the-drink taxes are distributed by the commissioner of revenue. The General Assembly could see fit to allow and tax certain economic activities occurring within a political subdivision of the state and yet send a portion of these collected taxes to one or more of the local political subdivisions where the taxed activity is not occurring. Who or what is taxed is analytically and practically different then who or what receives those funds.

e. The General Assembly may direct the distribution of liquor-by-the-drink tax revenue in its discretion

It is a contrived interpretation to find that the General Assembly intended Tennessee Code Annotated section 57-4-103(a)(1) to restrict the General Assembly's prerogative in allocating tax revenue generated from the sale of liquor-by-the drink. The General Assembly earmarked fifty percent of all gross receipted taxes collected under section 57-4-301(c) for its own general fund to be earmarked for education purposes. These funds are allocated for education purposes throughout the state of Tennessee regardless of the status of liquor-by-the-drink sales and consumption within a locality. The portion of liquor-by-the-drink revenues devoted to schools is so designated only because of the legislature's prior determination.

The legislature may alter or amend that decision so as to better serve the general welfare, according to its own exclusive discretion. The General Assembly can, and apparently has, determined liquor taxes that accrue to a municipality for local schools shall go entirely for education within that municipality. Such is a reasonable determination and well within

the legislature's power. To quote from the Court of Appeals,

> [t]he Appellant's position is worthy of consideration. Perhaps these in-lieu-of-tax payments should be treated differently from other federal revenues and similar to local property tax revenues. However, T.C.A. § 49-3-315, as presently written and construed by the Conger court, clearly does not permit this court to reach such a conclusion. We suggest, as did the court in Conger, 'The city's prayer for relief must be addressed to the General Assembly.

Oak Ridge City Sch. v. Anderson Cty., 677 S.W.2d 468, 471 (Tenn. Ct. App. 1984). The County's relief from the implementation of the provisions of Tennessee Code Annotated section 57-4-306, which it asserts deprives the children of its county school system the benefit of state liquor-by-the-drink funds for education, must come from the General Assembly, not this Court.

f. The Legislative History of Section 57-4-306 indicates the County is not entitled to a portion of the funds received by the Cities for school purposes

This Court finds the provisions of Tennessee Code Annotated section 57-4-306 are not ambiguous. However, even if the statute is found ambiguous, the legislative history supports this Court's interpretation of the statute that municipalities operating their own school system are not required to share these funds with the other local governments.

As mentioned previously, in 1980 the Attorney General rendered his opinion as to how the liquor-by-the-drink taxes should be distributed when a municipality, but not a county, had passed a liquor-by-the-drink referendum. 1980 Tenn. Op. Att'y. Gen. No 80-547. The Attorney General responded that in those situations, "the fifty percent (50%) distribution, under T.C.A. § 57-4-306(2) [the new codification of 57-162], of the gross receipts tax collected would go entirely to the local municipality." *Id.* In 1981, the Attorney General opinioned that municipalities that do not operate a separate school system from the county were required to remit the fifty percent portion designated for education to the local county.

1981 Tenn. Op. Att'y Gen. No. 81-270. In 1982, the Attorney General further clarified his opinion regarding section 57-4-306. The Attorney General expressed his position that a municipality is entitled to retain liquor-by-the-drink tax funds when the local county never adopted liquor-by-the-drink by referendum. 1982 Tenn. Op. Att'y Gen. 82-21.

In response to the Attorney General's opinions, the Tennessee General Assembly amended Tennessee Code Annotated section 57-4-306 in 1982. Senator Albright, the sponsor of Senate Bill number 1817 bill/House Bill number 2277, which was offered to amend section 57-4-306, stated in committee debate that the purpose of his bill concerning section 57-4-306 was to codify the ruling of the Attorney General and the "practice" that when "proceeds . . . or distribution to municipalities which do not operate their own school system separate from the county, are required to remit one-half of their proceedings [sic] from the gross receipts liquor by the drink tax to the county school fund." *1982 Public Acts: Hearing on S.B. 1817 Before the Senate Finance, Ways & Means Committee* (Tenn. 1982) (statements of Senator Albright, Member, Senate Finance, Ways & Means Committee). There was no question in Senator Albright's understanding of the state of the law regarding the one-half distribution to the municipality and whether the municipalities of the state were required to share these funds with the county when the municipality operated its own separate school system.

Senator Albright's presentation to the Senate Finance, Ways & Means Committee included his description of his understanding of the law related to distribution of local option sales tax proceeds with the statement that "under the law now . . one half of the percentages from the gross receipts liquor by the drink tax goes to the cities, where, uh, to go into their city education fund - to provide, that provides an education, uh, school system." *Id.* Senator Albright assured Senator Crouch that his bill "doesn't affect you [who still operate a school

system in a city] at all. It goes to the city." *Id.* Representative Davis echoed Senator Albright when Representative Davis stated "[t]his [House Bill 2277] simply changes the law to provide that in the event the city does not operate [a] school system, that money will go to the county." *1982 Public Acts: Hearing on H.B. 2277 Before the House Calendar & Rules Committee* (Tenn. 1982) (statements of Representative Davis, Member, House Calendar & Rules Committee).

The relevant statute for the case at bar is Tennessee Code Annotated section 57-4-306 as it was amended in 1982 states:

> (a) All gross receipts of taxes collected under § 57-4-301(c) shall be distributed by the commissioner as follows:
>
> (1) Fifty percent (50%) to the general fund to be earmarked for education purposes; and
>
> (2) Fifty percent (50%) to the local political subdivision as follows:
>
> (A) One half (1/2) of the proceeds shall be expended and distributed in the same manner as the county property tax for schools is expended and distributed; provided, however, that except in counties having a population of not less than twenty-seven thousand nine hundred (27,900) nor more than twenty-seven thousand nine hundred twenty (27,920) according to the 1980 federal census or any subsequent federal census, *any proceeds expended and distributed to municipalities which do not operate their own school systems separate from the county are required to remit one half (1/2) of their proceeds of the gross receipts liquor-by-the-drink tax to the county school fund*; and
>
> (B) The other one half (1/2) shall be distributed as follows:
>
> (i) Collections of gross receipts collected in unincorporated areas, to the country general fund; and
>
> (ii) Collections of gross receipts in incorporated cities and towns, to the city or town where in such tax is collected."

TENN. CODE ANN. § 57-4-306 (1982)(emphasis added).

As previously mentioned, before the Senate Bill 1817 was passed, Senator Albright stated that Tennessee Code Annotated section 57-4-306 was interpreted by the General Assembly and by the practice of the commissioner and the respective political entities to give all the funds from the liquor-by-the-drink taxes to the either municipalities or counties that passed liquor-by-the-drink referendums. Senator Albright stated his legislation was offered for the purposes of codifying the 1981 and 1982 opinions of the Attorney General that when a municipality does not operate a separate school system from the county, the municipality is required to remit twenty-five percent of the tax fund to the county. Representative Davis echoed Senator Albright's statements in the House. A court may presume that the General Assembly is aware of its previous enactments and how those enactments have been interpreted. In this case, the presumption is unnecessary since Senator Albright explicitly stated why the General Assembly needed to amend section 57-4-306.

It is not essential to determine whether the Attorney General has fallaciously interpreted Tennessee Code Annotated section 57-4-306 in a series of opinions in the early 1980s. What is significant is the Senate and the House understanding and adoption of part of the Attorney General's reasoning related remittance to the county when a municipality did not operate a separate school system. If the Senate or House disagreed with the Attorney General in other parts of his opinion finding the law imposed no requirement for a municipality to share its distribution of liquor-by-the-drink tax revenue earmarked for education with the county according to the average daily attendance formula, Senator Albright or Representative Davis could have alerted their fellow legislators to their disagreement with the Attorney General or the General Assembly could have further amended section 57-4-306 to correct the understanding of the law reached by the Attorney General.

They did not either in their respective sessions or in the amending of section 57-4-306.

More significant to understanding the policy of the General Assembly reflected in section 57-4-306, the legislative enactments of the General Assembly concerning section 57-4-306 made no provision to reverse or disturb the understanding of the law as written and interpreted by the Attorney General as not requiring the municipality to share its share of liquor-by-the-drink tax proceeds with the local county. In fact, the legislative record reveals the opposite. Hypothetically, if section 57-4-306 required a municipality to further distribute liquor-by-the-drink tax funds according to the average daily attendance formula, the General Assembly of 1982 rejected that interpretation. The General Assembly has acquiesced to the interpretation that section 57-4-306 means that when a municipality operates a separate school system from the county, the municipality receives all twenty-five percent funds from the liquor-by-the-drink tax distributed to them for educational purposes. Therefore, even if the Attorney General initially interpreted § 57-4-306 erroneously, the General Assembly has accepted that interpretation.

This Court finds that based on either the plain language or the legislative history of section 57-4-306, the county school fund and Plaintiffs are not entitled to any portion of liquor-by-the-drink proceeds distributed to the Cities pursuant to Tennessee Code Annotated section 57-4-306(a)(2)(A).

g. Tennessee's Constitution does not preclude counties from receiving liquor-by-the-drink tax revenues collected within a municipality

The Cities argue the money collected on liquor-by-the-drink sales within the respective municipalities are local taxes imposed by the municipalities, which are not subject to sharing with the County. The relevant provision of the Constitution states:

> The General Assembly shall have power to authorize the several counties and incorporated towns in this State, *to impose taxes for County and Corporation purposes respectively*, in such manner as shall be prescribed by law; and all property shall be taxed according to its value, upon the principles established in regard to State taxation.

Tenn. Const. Art. II, § 29 (emphasis added). This provision of the Constitution thus means taxes authorized by the General Assembly and imposed by local government must be used for local government purposes. The liquor-by-the-drink tax collected within the Cities is not a Article II, Section 29, tax imposed by the Cities that must be used for municipal purposes. The tax revenue generated by the liquor-by-the-drink tax is a state tax imposed uniformly where such sales are locally authorized. A better example of local source revenue would be the local option sales tax, which is levied by local governments themselves. While the local option sales tax, found at Tennessee Code Annotated sections 67-6-701 et seq., is collected by the Department of Revenue, the rate of the tax and its imposition are determined by the voters of the cities and counties. In contrast, the General Assembly imposed a uniform tax throughout the state on the sale of liquor-by-the-drink, and it has determined the rate. TENN. CODE ANN. § 57-4-301(c).

Since this Court holds that Tennessee Code Annotated section 57-4-306 imposes no obligation upon the Cities to share its funds received for school purposes from the liquor-by-the-drink tax on gross sales of those beverages, the Court will not adjudicate the Cities' estoppel and laches defenses.

VI. Conclusion

In summary, Tennessee Code Annotated section 57-4-306 is unambiguous. The commissioner of revenue is the only person or entity that is required to distribute funds under section 57-4-306. The commissioner distributes fifty percent of the funds to the general state

fund. The commissioner then distributed the remaining fifty percent to the local political subdivision that adopted liquor-by-the-drink and from the tax revenue was generated. Twenty-five percent of those funds must be "expended and distributed" to the respective local political subdivision (i.e. either the municipality or the county that has adopted liquor-by-the-drink) to be used for funding education. If a municipality receives these tax funds, the municipality is not required under section 57-4-306 to share the funds according to the average daily attendance as the county would be required under different statutory provisions. Even if section 57-4-306 was ambiguous, the legislative history confirms that when a municipality is operating a separate school from the county, then that municipality is entitled to all of the funds.

Taking into account these considerations and reasons, it is therefore ORDERED, ADJUDGED, and DECREED by the Court that:

1) Summary judgment for the City of Bristol and City of Kingsport is granted;

2) Summary judgment for Sullivan County and the Sullivan County Board of Education is denied;

3) Plaintiffs' causes of action are dismissed;

4) Court costs are taxed to Plaintiffs.

SO ORDERED, this 2nd day of February 2016.

*CLERK & MASTER, enter and serve this Final Order upon counsel.

CHANCELLOR JOHN C. RAMBO,
by Order of Designation

IN THE PROBATE COURT
FOR CARTER COUNTY
AT ELIZABETHTON, TENNESSEE

CHAZ ALDEN HUGHES and TESSARAI LEE HUGHES-POWERS, Plaintiffs/Counter-Defendants, v. R. ALLEN HUGHES, Defendant/Counter-Plaintiff.	Case No. 28680 *CLERK & MASTER FILED THIS 12th DAY OF Nov 2015 AT 2:32 O'CLOCK P. M. MELISSA MORELAND CLERK AND MASTER

ORDER

The matter before this Court stems from a dispute between Plaintiffs and Defendant regarding distribution of the proceeds of Decedent's life insurance policy. On August 5, 2014, Defendant filed a Motion for Summary Judgment. Defendant's Motion for Summary Judgment was heard by the Honorable John C. Rambo, Chancellor of the First Judicial District, State of Tennessee, on June 25, 2015, and is the subject of this Order.

There are two issues before this Court for adjudication:

1) Whether a constructive trust in favor of Plaintiffs is appropriate pursuant to Tennessee domestic relations law.

2) Whether Tennessee domestic relations law is preempted under the Supremacy Clause of the Constitution of the United States.

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MINUTE BOOK NO. 209
Melissa Moreland
MELISSA MORELAND, CLERK & MASTER

FINDINGS OF FACT

Plaintiffs are the children and exclusive heirs of Decedent. Defendant is the brother of Decedent, and sole beneficiary of Decedent's life insurance policy. The proceeds of this life insurance policy are at issue in this case.

Decedent was an employee of the United States Postal Service. By virtue of his federal employment, Decedent participated in the Federal Employees Group Life Insurance Act ("FEGLIA"). In 1991, Decedent named Defendant as sole beneficiary of his life insurance policy. In 1992, Decedent was divorced from Cathy Hughes. As a condition of the divorce, a Final Decree of Divorce ("Decree") and Marital Dissolution Agreement ("MDA") were entered. The MDA required Defendant to name Plaintiffs as beneficiaries. However, Defendant remained the designated beneficiary at Decedent's death.

Plaintiffs contend that Defendant has repeatedly stated he is holding the policy proceeds for Plaintiffs' benefit. Defendant has also paid balances on Plaintiffs' college loans, and made various other distributions on Plaintiffs' behalf. Accordingly, Plaintiffs claim that Decedent named Defendant as sole beneficiary on the policy with the stipulation that Defendant hold the money in trust for Plaintiffs' benefit. Plaintiffs also contend they are third-party beneficiaries of the policy by operation of the MDA. On these bases, together and in the alternative, Plaintiffs maintain that imposition of a constructive trust is the appropriate remedy. Defendant counters that Tennessee law is preempted by FEGLIA's provisions, and seeks summary judgment.

CONCLUSIONS OF LAW

I. Summary Judgment Standard

The Supreme Court of Tennessee recently clarified Tennessee's summary judgment standard. In *Rye v. Women's Care Center of Memphis, MPLLC*, the Court stated that:

> when the moving party does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense.

No. W2013-00804-SC-R11-CV, 2015 Tenn. LEXIS 906 (Tenn. Oct. 26, 2015)(emphasis added). Pursuant to the requirements of Tennessee Rule 56.03, the moving party must "support its motion with a 'separate concise statement of material facts as to which the moving party contends there is no genuine issue for trial'." *Id.* (citing Tenn. R. Civ. P. 56.03). Importantly, the nonmoving party may not rest upon allegations or denials of its pleading, but must respond with evidence showing there is an issue for trial. *Id.* In determining whether summary judgment is appropriate, the court must view evidence in the light most favorable to the non-moving party. *Harris v. Haynes*, 445 S.W.3d 143, 146 (Tenn. 2014).

II. Preliminary Evidentiary Matter

As a preliminary matter, this Court must rule on Defendant's Motion to Strike Part of Affidavit of Dr. Victor C. Young. The portion of the affidavit in controversy provides:

> Defendant said he did not know the best way to give them [Plaintiffs] the money. I asked Defendant to the effect of "What did Brady tell you to do with

the money?" Defendant replied "Make sure they were taken care of and they got the money." I replied "Then you know the answer."

Defendant is trying to strike this portion of the affidavit on the ground that it is inadmissible hearsay. Plaintiff contends that the statements are not hearsay, or alternatively, that they come in under the Admission by Party Opponent exception to the hearsay rule.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c). If a statement is hearsay, it is not admissible, "except as provided by these rules or otherwise by law." Tenn. R. Evid. 802. As applicable here, hearsay is admissible if it is an admission by a party opponent. Tenn. R. Evid. 803(1.2). The Admission by Party-Opponent exception states, in pertinent part, that "[a] statement offered against a party that is (A) the party's own statement in either an individual or a representative capacity" is not excluded by the hearsay rule. *Id.* Finally, and significantly in the context of this case, Tennessee Rule of Evidence Rule 805 states that "[h]earsay within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules or otherwise by law."

In this case, Dr. Young's affidavit contains two statements that must be analyzed under the hearsay rules. The first layer of hearsay is Defendant's statements to Dr. Young. The second layer of hearsay is Decedent's statements to Defendant, which were then reiterated to Dr. Young by Defendant. Each level of hearsay is addressed in turn.

First, Defendant's statements to Dr. Young were made by Defendant outside of court. Plaintiffs are attempting to use the statements to demonstrate an agreement between Decedent and Defendant to hold the policy benefits in trust for Plaintiffs, directly supporting their case. As a result, the statements are offered for the truth of the matter asserted. Therefore, Defendant's statements to Dr. Young are hearsay.

Next, it must be determined whether Defendant's statements to Dr. Young fall within the Admission by Party Opponent exception to the hearsay rule. The statements are offered against Defendant, as they directly support Plaintiffs' case. Additionally, as Defendant made the statements to Dr. Young, the statements are Defendant's own statements made in an individual capacity. Consequently, Defendant's statements to Dr. Young are admissible under the exception for Admission by Party-Opponent.

Second, the statements in Dr. Young's affidavit made by Decedent to Defendant were made out of court. Decedent died prior to the present action being filed and could not have made the statements in court. Additionally, Decedent's statements directly support Plaintiffs' case, and are, therefore, offered for the truth of the matter asserted. Accordingly, the statements of Decedent contained in Dr. Young's affidavit are hearsay.

Further, Decedent's statements are offered against Defendant, as they support Plaintiffs' case. The statements were made by Decedent, who is not a party to this case. Defendant did not make the statements in any capacity. Accordingly, the statements do not fit within the Admission by Party-Opponent exception to the hearsay rule. Therefore, Decedent's statements to Defendant, contained in Dr. Young's affidavit, are inadmissible hearsay.

Finally, the interrelation between the statements of Defendant and Decedent in the affidavit must be addressed. Defendant's statements are admissible under a hearsay exception; Decedent's statements are not. As both are contained in the same statement offered to the Court, the entire statement must be excluded as hearsay within hearsay.

Therefore, the Defendant's Motion to Strike Part of Affidavit of Victor C. Young is hereby granted.

III. Tennessee Domestic Relations Law

Plaintiffs argue that a constructive trust must be imposed on the proceeds. This argument is based on operation of Tennessee domestic relations law. Thus, this Court must determine whether a constructive trust is appropriate under these circumstances.

In Tennessee, a constructive trust is appropriate where "property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest equity converts him into a trustee." *Holt v. Holt*, 995 S.W.2d 68, 71 (Tenn. 1992). Constructive trusts are employed in a number of circumstances. *Id.* at 72. Significantly, "Tennessee courts have utilized equitable grounds to protect persons legally mandated to be listed as beneficiaries of a life insurance policy." *Id.*

For instance, in *Holt*, the court imposed a constructive trust on life insurance proceeds, where a provision in the marital dissolution agreement directed that the policy proceeds be paid to the husband's ex-wife and son. *Id.* The Court stated that "when a life insurance policy exists at the time of the divorce decree, the mandated beneficiary of the divorce decree retains a vested interest in that policy in the event that the obligor spouse does not comply with the terms of the divorce decree." *Id.*

Additionally, the Tennessee Court of Appeals, in *Briceno v. Briceno*, imposed a constructive trust on the decedent's life insurance policy proceeds in favor of the decedent's wife. No. M2006-01927-COA-R3-CV, 2007 Tenn. App. LEXIS 719 (Tenn. Ct. App. Nov. 21, 2007). The plaintiff, the decedent's ex-wife, had been awarded the decedent's life insurance proceeds under the parties' divorce decree, but upon the decedent's death the proceeds were given to the decedent's surviving spouse. *Id.* The court reasoned that a constructive trust was an appropriate remedy, as the plaintiff had a vested interest in the proceeds by operation of the divorce decree. *Id.*

In this case, a constructive trust would be appropriate under Tennessee law. Plaintiffs' third-party beneficiary and resulting trust arguments merge, cumulatively asking that a constructive trust be imposed for their benefit. The controlling MDA required Decedent to name Plaintiffs as beneficiaries of Decedent's life insurance policies. Similarly to *Holt*, the designation of Plaintiffs as beneficiaries in the MDA gives them a vested interest in the policy proceeds. As Decedent's FEGLIA policy was in effect at the time of the divorce decree, it is subject to the terms of the MDA. Therefore, a constructive trust would be imposed by this Court, were the analysis to go no further.

A. Preemption of Tennessee Domestic Relations Law

In response to Plaintiffs' argument for a constructive trust under Tennessee law, Defendant counters that FEGLIA preempts Tennessee domestic relations law. Plaintiffs contend that preemption applies both through FEGLIA's order of precedence provision, as well as through the statute's anti-attachment principles.

In reply, Plaintiffs maintain that preemption should not be allowed, based on Defendant's fraud and wrongdoing in breaching the alleged promise to hold the policy proceeds in trust for Plaintiffs' benefit. Accordingly, preemption by FEGLIA's provisions, and the suitability of preemption where fraudulent conduct has allegedly taken place, are addressed separately below.

1. Preemption by FEGLIA

"The Supremacy Clause provides that 'the Laws of the United States' (as well as treaties and the Constitution itself) 'shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding'." *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595-96 (2015). Accordingly, Congress may preempt state law by enacting federal law. As applicable to the present case, Congress may preempt based on conflict preemption, "where compliance with both state and federal law is impossible, or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 1596. In such a case, federal law holds supreme, and prevails over state law. *Id.*

Here, Defendant's summary judgment argument is grounded in the federal preemption of Tennessee domestic relations law by FEGLIA. Regulation of domestic relations is customarily a responsibility of state legislation. *Hillman v. Maretta*, 133 S. Ct. 1943, 1950 (2013). Consequently, there is a "presumption against pre-emption of state laws governing domestic relations, and family and family-property law must do major damage to clear and substantial federal interests before the Supremacy Clause will

demand that state law will be overridden." *Id.* However, conflict preemption still applies to domestic relations laws in certain instances. *Id.*

a. Preemption based on order of precedence.

FEGLIA's language provides an order of precedence for payment of proceeds. In pertinent part, payment goes "first to the beneficiary or beneficiaries designated by the employee in a signed and witnessed writing received before death." *Id.* at 1948. The Court here must determine whether this order of precedence trumps Tennessee state law concerning constructive trusts.

In *Wissner v. Wissner*, the Supreme Court considered whether California community property law conflicted with provisions of a federal insurance statute. In that case, the decedent named his mother as beneficiary of his federal insurance policy, rather than his wife. 338 U.S. 655, 656 (1950). The decedent's wife brought an action, contending that state community property law entitled her to one-half of the policy proceeds, with which the lower court agreed. *Id.* at 657-58. The Supreme Court overturned, holding that the language of the federal insurance statute was controlling, and dictated that the proceeds belonged to the named beneficiary and no other party. *Id.* at 659.

Further, in *Ridgeway v. Ridgeway*, the Supreme Court considered whether an insured's designated beneficiary under a federal insurance statute prevails over a constructive trust "imposed upon the policy proceeds by a state-court decree." 454 U.S. 46, 47 (1981). The decedent's divorce judgment required him to keep in force life insurance for the benefit of his children, but upon the decedent's death, the proceeds were

paid to his new wife. *Id.* at 48. The Court found controlling the provisions of the federal statute, holding that they "prevail over and displace inconsistent state law." *Id.* at 51. As such, the federal statute's order of precedence, providing that designated beneficiaries must be paid first, was controlling. *Id.*

Finally, *Hillman v. Maretta* provides a substantially parallel set of facts and law. 133 S. Ct. at 1947. There, the court addressed the question of whether a state statute was preempted by FEGLIA. *Id.* In that case, the decedent's ex-wife was named as the beneficiary of his life insurance policy, despite the fact he had remarried, because he had not changed the terms of the policy. *Id.* at 1949. The decedent's new wife, to whom he was married at the time of his death, sought to obtain the policy proceeds. *Id.* Specifically at issue was the conflict between FEGLIA's order of precedence, and a Virginia state law that revokes a beneficiary designation when a divorce or annulment takes place. *Id.* at 1948. The Supreme Court upheld the ex-wife's beneficiary designation, finding that Virginia law was preempted. The Court reasoned that if preemption were not applied, state law would substitute another for the "beneficiary Congress directed shall receive the insurance money." *Id.* at 1952. The Court indicated that this would frustrate Congress' purpose in enacting the statute, which was protecting the named beneficiary of the policy. In summation, the Court stated that "where a beneficiary has been duly named, the insurance proceeds she is owed under FEGLIA cannot be allocated to another person by operation of state law, and therefore the state law was pre-empted." *Id.* at 1953.

The three cases discussed above provide a plethora of similarities to this case, and demonstrate that FEGLIA preempts any applicable Tennessee state law. A different

individual would prevail based on whether Tennessee or federal law applies. Under Tennessee law, a constructive trust in favor of Plaintiffs would likely be imposed by operation of the MDA. Under federal law, FEGLIA's order of precedence would dictate that Defendant is entitled to the proceeds as the named beneficiary. Accordingly, imposition of a constructive trust under Tennessee law would directly conflict with FEGLIA's provisions, and the principles of preemption would be applicable. Therefore, the Supremacy Clause supersedes Tennessee state law, FEGLIA's provisions control, and Defendant, as the named beneficiary, is entitled to the proceeds.

b. Preemption by anti-attachment provision

As indicated above, Plaintiffs partially base their argument for imposition of a constructive trust on an alleged agreement between Decedent and Defendant. Thus, Plaintiffs are arguing that the proceeds should be held in trust for them by operation of law. Defendant, in his Motion for Summary Judgment, argues that attachment is not proper under FEGLIA. The Court agrees with Defendant.

In *Ridgeway*, the Supreme Court considered whether the imposition of a constructive trust conflicted with a federal insurance statute's anti-attachment provision. 454 U.S. 46, 57-58 (1981). In that case, the statute at issue prohibited any "attachment, levy, or seizure by or under any legal or equitable process whatever." *Id.* at 58. The purpose of this provision, the Court found, was to guarantee that the benefits were received by the beneficiary. *Id.* Therefore, the Court found the anti-attachment provision preempted all state law that inhibited its operation, and that a constructive trust was preempted. *Id.*

In *Hillman*, the court addressed the anti-attachment provisions, or lack thereof, under FEGLIA. 133 S. Ct. at 1954. The absence of an anti-attachment provision within FEGLIA's terms, the Court said, "does not render *Ridgeway's* and *Wissner's* primary holdings any less applicable. *Id.*

In this case, FEGLIA is at issue, similarly to *Hillman*. Plaintiffs argue that a constructive trust should be imposed by operation of law. This imposition of a constructive trust would be attachment by legal process. However, as the Supreme Court has stated that anti-attachment principles apply under FEGLIA, a constructive trust is inappropriate. As FEGLIA directly conflicts with Tennessee domestic relations law on the subject of attachment, FEGLIA preempts state law, and FEGLIA's anti-attachment principles prevail. Therefore, imposition of a constructive trust under Tennessee law is preempted by FEGLIA.

IV. Preemption and Fraud

In their response to Defendant's Motion for Summary Judgment, Plaintiffs argue that, while under normal circumstances FEGLIA may preempt imposition of a constructive trust, such is not the case here. Plaintiffs reason that Defendant's alleged fraud and wrongdoing prevents preemption. Plaintiffs maintain that fraudulent conduct occurred, in that Defendant breached his alleged promise to Decedent that he would hold the policy benefits in trust for Plaintiffs.

Generally, there is a "presumption against preemption, at least in areas of law traditionally regulated by the states." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). Such presumptions may only be overcome by "clear and manifest" indications of

congressional intent for the federal law to possess preemptive authority. *Wyeth v. Levine*, 555 U.S. 555 (2009).

Plaintiffs contend that Congress did not envision a "clear and manifest" intent to allow a beneficiary, such as Defendant, to profit from his fraudulent behavior. Defendant replied, stating that Plaintiffs have no material evidence that proves an agreement between Decedent and Defendant, nor any evidence that indicates any misrepresentation on the part of Defendant. Thus, this Court must first consider whether there is sufficient evidence that fraudulent conduct occurred.

A. Did fraudulent conduct on part of Defendant occur?

In Tennessee, the elements of fraud are (1) an intentional misrepresentation of a material fact, (2) knowledge of the representation's falsity, (3) an injury caused by reasonable reliance on the representation, and (4) the requirement that the misrepresentation involve a past or existing fact. *Kincaid v. SouthTrust Bank*, 221 S.W.3d 32, 40 (Tenn. Ct. App. 2006).

In addition, to establish a claim for promissory fraud, the party asserting promissory fraud must show that, at the time the promise was made, the person making the promise had no intention to perform." *Eddings v. Sears Roebuck & Co.*, No. W2001-01107-COA-R3-CV, 2002 Tenn. App. LEXIS 514, at * 12 (Tenn. Ct. App. July 19, 2002). In other words, the claimant must show "a false promise of future conduct without the present intention to perform." *Carbon Processing & Reclamation, LLC v. Valero Mktg. & Supply Co.*, 823 F. Supp. 2d, 814 (W.D. Tenn. 2011).

In *Fowler v. Happy Goodman Family*, the Tennessee Supreme Court held that "the mere subjective belief of the party alleging promissory fraud that the promisor had no intent to carry out the promise will not overcome a motion for summary judgment." 575 S.W.2d 496 (Tenn. 1978). In that case, there was an affidavit indicating a failure to perform, but only the petitioner's subjective belief and unspecified information was offered in support of the promissory fraud claim. *Id.*

In *Kandel*, the Tennessee Supreme Court held that it would be unwilling to apply promissory fraud absent *direct proof* of a misrepresentation of actual present intention. *Kandel v. Ctr. For Urological Treatment & Research, P.C.*, No. M2000-02128-COA-R3-CV, 2002 Tenn. App. LEXIS 260 (Tenn. Ct. App. April 17, 2002) (emphasis added). In *Sears*, the Tennessee Court of Appeals agreed, stating that direct proof of present intent to misrepresent was required. *Sears*, 2002 Tenn. App. LEXIS 514, at * 16.

Plaintiffs allegations of fraud amount to a claim for promissory fraud. They contend that Defendant and Decedent reached an agreement for Defendant to hold the benefits in trust for Plaintiffs, but that Defendant did not do so. As a result, Plaintiffs are claiming there was a false promise of future conduct without the present intent to perform.

In this case, taking Plaintiffs' allegations as true, the evidence would show that (1) Defendant intentionally misrepresented that he would hold the benefits in trust for Plaintiffs; (2) that Defendant knew at the time of making the promise he was going to keep the proceeds for himself; (3) that Decedent relied on Defendant's promise, which frustrated Decedent's intent for Plaintiffs to have the policy proceeds; and (4) as is necessary for promissory fraud, that at the time of the promise, Defendant had no

intention to hold the benefits in trust for Plaintiffs. However, this Court must determine whether the evidence, other than Plaintiffs subjective allegations, is sufficient to demonstrate promissory fraud.

Plaintiffs have offered evidence of Defendant's failure to perform his alleged promise to Decedent. First, Plaintiffs have offered the affidavit of Dr. Victor C. Young. This affidavit tends to show there was an agreement between Defendant and Decedent. However, the pertinent portion of the affidavit was stricken from evidence as inadmissible hearsay within hearsay.

Second, Plaintiffs have offered the affidavit of an Robert L. Weaver. Mr. Weaver is an accountant that met with Defendant. In his affidavit, Mr. Weaver states that he met with Defendant regarding the policy proceeds, specifically pertaining to what type of trust to set up for Plaintiffs' benefit. From the meeting, he maintains that it was his understanding that Defendant knew that he was to hold the proceeds in trust for Plaintiffs as a condition to his being designated sole beneficiary. The affidavit does not provide any direct proof of promissory fraud on the part of Defendant. It does tend to show an agreement between Defendant and Decedent, but does not indicate Defendant made such agreement with no intention to actually perform. As a result, this evidence does not support Plaintiffs' contentions of fraud.

Third, Plaintiffs' pleadings suggest there was an agreement between Decedent and Defendant. Further, they contend that actions by Defendant, including paying amounts on their college loans and giving them various other distribution, evidence an agreement. They also state that Defendant's refusal to create a trust after making these

disbursements indicate fraudulent conduct on the part of Defendant. Finally, they state that Defendant agreed to be sole beneficiary with no intention to ever create a trust for Plaintiffs with the proceeds. However, these contentions are merely subjective beliefs and do not provide any direct proof of an agreement or fraud.

Tennessee courts have explicitly held that direct proof of an intention not to perform the agreement at the time of its creation is required. Plaintiffs' subjective beliefs, embodied in their pleadings, offer no direct proof of fraud. The affidavit of Mr. Weaver is not direct proof of Defendant's intention not to perform the contract at the time of its making. The affidavit merely shows that there was an agreement; it does not indicate that Defendant intended to commit fraud at the time of the agreement's creation. In fact, Defendant's actions after Decedent's death indicate that, at the time of the agreement's creation, he had the present intent to hold the benefits in trust. In any event, Plaintiffs have failed to proffer sufficient evidence of promissory fraud or misconduct. Consequently, there is no need to proceed further to determine whether FEGLIA preempts Tennessee state law when fraudulent conduct has occurred, as Plaintiffs have failed to offer evidence sufficient to overcome summary judgment dismissal of a claim related to fraudulent conduct.

Therefore, Plaintiffs' contention that preemption is not applicable because of Defendant's alleged fraud must fail.

V. Summary Judgment

Defendant filed a Motion for Summary Judgment in this case. Thus, based on all of the facts and law, the final determination of whether summary judgment is appropriate must be addressed.

Plaintiffs ask that a constructive trust be imposed, and assert that preemption is improper to prevent the creation of a constructive trust. Case law on point explicitly states that FEGLIA's provisions preempt conflicting state law. Cases relating to substantially similar federal life insurance programs are even more on point; they explicitly say that federal insurance provisions preempt imposition of a *constructive trust.*

First, FEGLIA's provisions preempt all Tennessee law that would impose a constructive trust based on any of Plaintiffs' theories. Through his preemption argument, Defendant has submitted affirmative evidence negating an essential element of Plaintiffs' claim: that a constructive trust should be imposed by operation of Tennessee state law. Additionally, and again through evidence of preemption, Defendant has demonstrated that Plaintiffs' evidence is insufficient to establish that a constructive trust must be imposed. This satisfies both elements of Tennessee's summary judgment standard.

Second, there is insufficient evidence of an agreement between Decedent and Defendant, or any misrepresentation about such an agreement by Defendant. Plaintiffs' only proffered evidence is pleading allegations, a statement contained in an affidavit that was stricken as inadmissible hearsay, and an affidavit of an accountant that does not provide sufficient evidence of fraudulent conduct. This negates another essential element of Plaintiffs' claim, that preemption is inappropriate because of Defendant's fraudulent

conduct. As a result, Defendant's evidence of preemption has negated Plaintiffs' claims, and there is no genuine dispute requiring this case to proceed to trial.

For the aforementioned reasons listed herein it is hereby DECLARED and ADJUDICATED as follows:

1. The provisions of the Federal Employees Group Life Insurance Act, by operation of the Supremacy Clause, preempt Tennessee state law.

2. The Federal Employees Group Life Insurance Act controls and dictates that Defendant, the named beneficiary of the policy, is entitled to the policy proceeds.

3. Therefore, Defendant's Motion for Summary Judgment is hereby GRANTED and Plaintiffs' case is DISMISSED.

4. Court costs are taxed to Plaintiffs.

*Clerk and Master: enter and mail a copy of this Order to counsel/parties of record.

So ORDERED, this 10th day of June 2015.

JOHN C. RAMBO, CHANCELLOR

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Order was mailed, postage prepaid, as follows:

This the 12th day of November 2015.

Steven Huret
Wilson Worley PC
Eastman Credit Union Bldg.
P. O. Box 88
Kingsport, TN 37662

John B. McKinnon, III
801 Sunset Drive, Suite E-1
Johnson City, TN 37604

MELISSA MORELAND
CLERK AND MASTER

by: Joy Bradford
Deputy Clerk and Master